To the Graduate Council:

I am submitting herewith a dissertation written by Alicia Mischa Renfroe entitled "Life Leases on the Future: Legal Discourse in Selected Works of Louisa May Alcott, William Dean Howells, Henry James, and Edith Wharton." I have examined the final paper copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in English.

Mary E. Papke, Major Professor

We have read this dissertation
and recommend its acceptance:

Accepted for the Council:

Vice Provost and Dean of
Graduate Studies

LIFE LEASES ON THE FUTURE: LEGAL DISCOURSE IN SELECTED WORKS OF LOUISA MAY ALCOTT, WILLIAM DEAN HOWELLS, HENRY JAMES AND EDITH WHARTON

A Dissertation
Presented for the Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

Alicia Mischa Renfroe
December 2002

Copyright ©Alicia Mischa Renfroe, 2002

All rights reserved.

DEDICATION

To my parents Ronald and Helen Renfroe and to my aunt Ruth Evans, "Bubie,"
for their love and support throughout this process.

ACKNOWLEDGEMENTS

As I have worked on this project, I have been quite fortunate to be able to draw upon the support of others when my ability to write one more page or read one more article seemed in doubt; indeed, these acknowledgements could run as a long as some of the chapters that follow. Without the assistance of these people, I know this project could not have been contemplated, much less completed.

I extend my deepest appreciation to my committee, Drs. Mary Papke, Allen Dunn, Charles Maland, and Otis Stephens, for helping me turn my ideas into a workable project and for providing advice and encouragement throughout this process. I am particularly grateful for their willingness to review the last few chapters in time to meet my graduation deadlines. I offer my heartfelt gratitude to my director, Dr. Mary Papke, who has encouraged my interest in American literature since I was an undergraduate in her Women in Literature course. Indeed, that course was my first upper-division English class, and it is a tribute to her teaching skills that I eventually decided to pursue graduate studies in English. Over the past five years, Dr. Papke has served as both friend and mentor, offering encouragement and support during the illnesses and deaths of my grandparents as well as providing professional advice. Always acting above and beyond the call of duty, she has fostered my intellectual development in more ways than I can possibly mention. I also owe a significant debt to Dr. Allen Dunn, who sparked my interest in Critical Theory and philosophy. Indeed, I cannot imagine writing Chapter One, a whirlwind tour of social contract theory and its various critiques, without his guidance. Despite his busy schedule, Dr. Dunn always managed to find the time to help me to

understand complicated philosophical arguments. Our conversations often provided intellectual riches that sometimes exceeded my ability to put them to use here; these conversations will certainly be invaluable as I revise this dissertation for future publication. I am also grateful to Dr. Dunn for the opportunity to serve as his Editorial Assistant at *Soundings: An Interdisciplinary Journal.* I also wish to thank Dr. Charles Maland for his clear and insightful comments; his questions and suggestions always helped me to clarify my ideas. Dr. Maland also amazed me with his ability to read and to respond, often on very short notice, to lengthy chapters. I also thank my outside reader, Dr. Otis Stephens of the University of Tennessee College of Law, for his assistance with legal scholarship, particularly regarding Supreme Court cases, and political philosophy; his thoughtful questions certainly helped me to refine my argument. I also owe Dr. Stephens a special thank you for encouraging my interest in law when I was an undergraduate student in his Constitutional Law courses.

Other University of Tennessee faculty members have provided advice and support during my graduate career. I thank Professor Joe Cook, of the University of Tennessee College of Law, for his assistance with contract law and for permitting me to audit the jurisprudence course he team-taught with Dr. Stephens. Many members of the English Department have also fostered my academic career. Before I decided to specialize in American Literature, I worked with several fine advisors who allowed my interests to evolve. Drs. Richard Finneran and Ed Bratton encouraged my interest in working on James Joyce and William Wordsworth, respectively. Dr. Michael Lofaro also provided much needed advice about pesky details such as language requirements. I also thank Drs. Allen Carroll and Misty Anderson for directing independent studies when course

offerings did not fit my needs; Dr. Carroll designed a fantastic trip to London to study drama, and Dr. Anderson directed an intensive study of social contract theory that proved quite helpful to this project. Drs. John Zomchick, Misty Anderson, and Bob Leggett graciously allowed me to audit their courses as I prepared for various examinations. I also owe a significant debt to Allen Wier, the director of my Master's thesis in creative writing, for teaching me to pay attention to my sentences. Allen consistently invoked Henry James' famous dictum, "Try to be one on whom nothing is lost," and I have tried to keep that advice in mind here as well.

I also thank Kirsten Benson, Director of the University of Tennessee Writing Center, and Charlie Biggs, Managing Editor of *Soundings: An Interdisciplinary Journal*, for providing wonderful professional experiences during my non-teaching semesters. In addition to offering friendship and support, Kirsten taught me a great deal about both tutoring and teaching, and I hope to follow her example in my career. During my year as Editorial Assistant at *Soundings,* Charlie patiently taught me to format and edit manuscripts, all while listening to me talk about my dissertation. I am also grateful to the University of Tennessee Classics Department, particularly Drs. David Tandy and Christopher Craig, the opportunity to serve as a grader.

I extend my appreciation to the English Department staff. I especially thank Dinah Brock for her assistance and understanding. When Dinah served as graduate secretary, she always made sure that I submitted the right form at the right time, even calling my home to remind me of important deadlines. After Dinah moved to the department head's office, Leanne Hinkle took over as graduate secretary; Leanne's checklists and reminders about various graduation requirements were quite helpful during

the last hectic year of graduate study. In addition to Dinah and Leanne, Judith Veals and Pam Whaley provided assistance with various problems throughout my graduate career. I also thank Teresa Whaley for patiently answering numerous questions about travel funding and for processing the proper forms to ensure that I received reimbursement checks in a timely fashion.

During the last seven years, numerous friends and acquaintances in the English Department have offered their support. Eric Bledsoe, Gina Rossetti, Curt Rode, Pat Christle, Jo Angela Edwins, Abdi Hussein, Laura Rutland, Susan North, and Amanda Lawrence have provided their insights at key moments in my graduate career. I would also like to thank Kristina McCue for her friendship and for going above and beyond the call of duty to teach several of my classes during a personal crisis. I also thank the members of the Critical Theory Reading Group for the high level of intellectual engagement they always provide. I owe a special thank you to Lauren Todd-Taylor for her friendship and her continued patience and support, especially regarding all things theoretical.

Throughout my graduate career at the University of Tennessee, I have been fortunate to receive generous funding for my project as well as related interests. First, I would like to thank the English Department for the Graduate Teaching Associateship that provided the financial means to pursue an academic career. In addition to this support, I received several fellowships—the English Department's Chancellors Fellowship and Norman J. Sanders Dissertation Fellowship as well as the University of Tennessee's Arthur Yates Graduate Fellowship—which reduced my teaching load and thus enabled me to complete this project in a timely fashion. Both the English Department and the

University of Tennessee supplied ample funds to facilitate research and participation in professional activities. I am especially grateful for the Thomas J. Wheeler Research Fellowship, which funded travel to Houghton Library for fruitful archival research. The University of Tennessee also generously funded summer study in Bonn, Germany.

In addition to the professional support I have received from the University of Tennessee and the English Department, I have also been able to depend on my family and numerous friends. I thank my parents and "Bubie" for their love and faith in me and for overlooking my moods as I finished this project; I cannot possibly express everything they have done for me, and I certainly would not have earned a doctorate without their assistance. I also thank a certain furry person, my dog Yellow, for not chewing up too many articles and books and for making me take him for walks and thus leave my computer for short breaks. My friends also offered much needed emotional support. Jill Morris, whose exemplary career at Harvard provided inspiration in and of itself, consistently reminded me to stay focused on my goals. I also thank Nicole Economy Brown and Kristin Singleton, especially for their friendship during the difficult law school years. Indeed, if not for Nicole's persistence, I likely would not be a licensed attorney today, and I thank her for dragging me to the Florida Bar Exam. Lisa West, Angela Byers, and Kelly Kilgore Halvorsen listened to my complaints as well as my ideas and kindly refrained from commenting on either one; I cannot express my gratitude for their friendship. I also owe a special debt to Kelly for her unwavering support even as she faced the death of her husband, Bruce Halvorsen; as I finished this project, I missed Bruce's calm presence and willingness to listen, and I thank him here for his friendship.

ABSTRACT

This project investigates the use of legal discourse, particularly the language of contractual obligation and rights claims, in selected works by Louisa May Alcott, William Dean Howells, Henry James, and Edith Wharton. By carefully examining specific instances of legal discourse in these writers' texts, I suggest its importance to these writers as a means to articulate specific claims about human needs and to challenge the ways in which, generally speaking, law and philosophy respond to these claims. Thus, I argue that legal discourse works in two primary ways in these writers' texts: first, legal discourse marks the intersection of legal and ethical claims, and second, legal discourse calls up both the limits and possibilities of law, and by extension philosophy, as a means to resolve such claims.

Each author, in one or more major works, uses legal discourse to address questions about justice and thus asks us to consider what characterizes and ethical person and what constitutes ethical relationships with others. An analysis of the work of Alcott and Howells reveals the relationship between rights claims and their origins in contract as interpersonal promising and within the broader framework of the social contract and legal contracts as means to define and to establish justice. This relationship, rendered problematic by Alcott and Howells, is extensively critiqued by James and Wharton.

TABLE OF CONTENTS

Introduction 1

Chapter One: The Social Contract: Critique and Revival 28

Chapter Two: "In Love and In Law": Legal Discourse in Selected Works by Louisa May Alcott 79

Chapter Three: The Promise of Past Performance: Contracts, Cannibals, and Civil Society in Selected Novels by William Dean Howells 147

Chapter Four: The Continual Fulfillment of Contracts: Representations of Social Relations in Selected Works by Henry James 218

Chapter Five: Freedom of Contract, Rights Claims, and Justice in Selected Works by Edith Wharton 278

Conclusion 342

Bibliography 352

Vita 374

INTRODUCTION

"I should like to consult my lawyer first."
Zinnie Wheater, Edith Wharton's *The Children*

Little Zinnie Wheater, age eight, asserts her right to counsel when the Princess Buondelmonte suggests that Zinnie might want to live with her biological mother, Zinnia Wheater Lacrosse Wrench. The Princess meets Zinnie when she visits Zinnie's step-siblings, Bun and Beechy Buondelmonte, with the intention of reuniting the Buondelmonte children with their father, Prince Buondelmonte, the Princess' new husband. To complicate matters further, Zinnie lives with an unusual combination of full, half, and step siblings, all of whom have "sworn an awful oath" to stay together rather than be separated by the claims of their various parents (58). In addition to Zinnie and the Buondelmontes, the group includes Judith, Terry, Blanca, and Chipstone Wheater, all of whom are the biological children of Cliffe and Joyce Wheater. Cliffe Wheater is also Zinnie's father while Joyce Wheater somehow ended up with the Buondelmonte children, though she is not their biological mother, after she divorced the Prince. Despite the children's "awful oath," their respective parents, oftentimes along with new spouses, eventually decide to reclaim their biological offspring, an event that Judith Wheater, who, at fifteen, is the eldest of the children as well as their caretaker, manages to postpone as long as possible. In an effort to keep all the children together, Judith enlists the aid of Martin Boyne, a middle-aged bachelor who attended college with Cliffe Wheater and eventually falls in love with Judith. Boyne enters a contract of sorts with the children by taking the equivalent of his own "awful oath" when he "promise[s] and swears" (100) to help them, as Terry Wheater puts it, "make some kind of terms with father and mother"

(111) because, again according to Terry, "if children don't look after each other, who's going to do it for them?" (116). When Boyne meets with the parents as "the children's spokesman" (143), he faces a series of legal claims as Cliffe, like a self-interested party bargaining for the upper hand in a business deal, claims "I can dictate my terms" (131) at the same time that Joyce contends that the children would be happier with her since Cliffe can only assert "his right to keep them" (134). Similarly, Zinnia Wrench argues her "right" to be present at any discussion of Zinnie's future (141). Despite all these claims, Boyne urges them not to look at the situation from a "legal standpoint" (142). Instead, as Boyne explains, "I don't see that the law concerns these children. . . .What they need is not to be fought over, but just to be let alone" (143).

As this brief account of *The Children* suggests, Edith Wharton's use of legal discourse, particularly the language of contractual obligation and rights, indicates that the law plays a prominent role in sorting out the little Wheaters' affairs. Indeed, Wharton bombards her readers with competing legal claims even as she invokes similarly legalistic language to garner her audience's sympathy for the children themselves. In this sense, the novel aptly dramatizes the intersection of legal and ethical issues because Wharton uses legal discourse to articulate both legal claims and ethical claims that cannot necessarily be resolved according to law.

It is this complicated convergence of legal and ethical claims that this project will address. Like Wharton, Louisa May Alcott, William Dean Howells, and Henry James employ legal discourse throughout their works. For instance, the first line of Louisa May Alcott's *Work* calls for "a new Declaration of Independence" that will extend the legal rights that most men have traditionally enjoyed to women. Similarly, William Dean

Howells, both praised and vilified as a spokesperson for literary realism, expresses concern, in both his fiction and non-fiction, about legal rights and the material conditions, particularly economic conditions, within which those rights are necessarily situated. In the February, 1890 "Editor's Study" column, Howells, who studied law before he became a writer, argues that

> the legal right of one man to luxury through the misery of another is questionable; and it is comically, it is tragically futile to tell people not to get gain, and take advantage, when the wayfaring man can see that these are the very conditions of success, and of mere bread and meat, in society constituted as it is. (140)

As Howells suggests, legal claims are often closely linked to the economic marketplace. Like Howells, Henry James also studied law and concerned himself throughout his career with the rights and wrongs of human action. Indeed, in *The Portrait of a Lady,* one of his most famous characters, Isabel Archer, comes to realize that "one's right is always made at the wrong of someone else" (295). For each of the writers under consideration here, legal discourse provides the means to describe as well as to question both legal and ethical justifications of the rights and wrongs of human action, and a close reading of legal discourse in selected works by Alcott, Howells, James, and Wharton reveals the tensions among self-interest, public interest, and competing visions of what it means to live a good life. As the above examples suggest, Alcott, Howells, James, and Wharton use legal discourse, particularly the language of contractual obligation and rights, to suggest the intersection of legal and ethical issues.

Though each of these authors seems preoccupied with legal discourse in the novels they write as well as their personal correspondence and other non-fiction works, few literary critics explore the role of law, both its philosophical underpinnings and its specific historical application, in late nineteenth and early twentieth-century literature. [1] This project will attempt to fill that gap by situating what I refer to as legal discourse within the context of its philosophical origins in social contract theory and of late nineteenth and early twentieth century legal debates about contract law. Though I will investigate the philosophical origins more fully in Chapter One, I will briefly mention here that, generally speaking, rights claims are closely related to contractual obligation, both as a social contract as well as a legal contract or ethical promise that invokes the language of the law. The social contract provides one way to structure relationships between the individual and the community and to justify political and ultimately legal authority and obligation. Thus, social contract theory presumes that individual self-interest often conflicts with public interest, and as a result, the social contract seeks to negotiate a fundamental tension between freedom and constraint. Indeed, according to social contract theory, free and autonomous individuals must consent to constraints upon their autonomy in order, paradoxically, to preserve their autonomy.[2]

---

[1] For one account of the many critical approaches to realism, see Michael Anesko's essay, "Recent Critical Approaches" in Donald Pizer's *The Cambridge Companion to American Realism and Naturalism.* Amy Kaplan also provides a detailed summary of the field in the introduction to *The Social Construction of American Realism.* See also chapters entitled "Realism and Regionalism" and "Naturalism and the Languages of Determinism" in *The Columbia Literary History of the United States.*

[2] Given numerous differences among social contract theorists, this brief account is intended to provide only the most general summary of social contract theory. Indeed, in their introduction to *The Social Contract from Hobbes to Rawls,* David Boucher and Paul Kelly divide social contract theories into three camps: moral contractarianism, civil contractarianism, and constitutional contractarianism (4-13). Moral contractarianism attempts "to ground moral principles in the creative self-interest of individuals who adopt constraints on their behaviour in order to maximize benefits" (3). Civil contractarianism represents "that

The generalized conception of the social contract originates in various sources, and scholars debate the extent of many philosophers' influence on the American version, reflected most notably in The Declaration of Independence, and its representation of an autonomous agent who possesses specific rights to life, liberty, and even happiness. Michael Rosenfield suggests that Hobbes, Locke, Kant, and Rousseau all contributed significantly to the general understanding of the social contract and its emphasis on an individualistic model of subjectivity. As Rosenfield argues,

> What most unifies all these otherwise divergent political philosophies is their commitment to individualism and their use of social contract as a device to elaborate a deep level, philosophical justification of the institutions of civil society and of the individual's obligation toward society. (847-48)

However, John Rawls provides a slightly different account in his influential twentieth-century restatement of social contract theory, *A Theory of Justice*. Rawls explains that the social contract, at least in its hypothetical version, allows men "to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society" (10). Each person, then, can freely choose "the system of ends which it is rational for him to pursue" (10-11). For Rawls, social contract theory specifies the conditions in which reasonable agents might agree about certain issues.

---

form of social compact, whether historical or hypothetical, whose role is either to legitimize coercive political authority, or to evaluate coercive constraints independently of the legitimation of the authority from which they derive" (4). Constitutional contractarianism provides legal definitions of the "rights and duties of both sovereign and subject" (10). Most of the theorists I will discuss fall into the first two categories.

With these general observations about social contract theory in mind, I will now turn to another kind of contract, legal contract, which replicates social contract theory's fundamental tension between freedom and constraint. Negotiated at the individual level, legal contracts and ethical promises, like the social contract, offer the opportunity to choose certain ends; however, in the realm of nineteenth-century contract law, the idea of free choice and consent become problematic. According to Oliver Wendell Holmes, Jr., "no where [sic] is the confusion between legal and moral ideas more manifest than in the law of contract" because "primary rights and duties are invested with a mystic significance beyond what can be assigned and explained" ("The Path of the Law" 174). Holmes points out that morals address individual intention, and contract law emulates this when a contract is defined as "a meeting of the minds of the parties" and "it is inferred in various cases that there is no contract because their minds have not met" (177). This loose definition of contract proves problematic, however, when "parties may be bound by a contract to things which neither of them intended" (177). For Holmes, a formal definition of contract solves this problem; "the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having meant the same thing but on their having said the same thing" (178). Holmes seems to articulate an objective standard when he concludes that "the whole doctrine of contract. . .is formal and external" (qtd. in Gilmore, *Death* 21). Holmes' dilemma highlights an important issue for legal thinkers: what is a contract?

The definition of a contract that may be legally enforceable has been extremely problematic. Are legal contracts highly abstract exchanges between autonomous subjects

who participate in the exchange and then separate again? In the alternative, are legal contracts highly contextualized exchanges in which the parties never really transcend the social web within which they are embedded? Dr. Theophilus Parsons, one of Henry James' professors during his brief time at Harvard Law School, offers an all-encompassing view of contract in his 1857 treatise on contract law. Parsons writes: "Almost the whole procedure of human life implies, or rather is, the continual fulfillment of contracts" (3). For Parsons, human activity depends on contractual logic as an organizing principle. Other early definitions of contract are essentially negative and define a contract by telling us what it is *not* rather than what it *is*. According to John William Smith's 1878 treatise *The Law of Contract,* an action that "did not involve a question of criminal law, or of the title to land" could be classified as either a contract or a tort (1). That is, actions that involve assaults or injuries to persons are considered torts, and whatever cannot be otherwise characterized is a contract (2). Richard T. Ely, a nineteenth-century political economist often mentioned by Howells in his "Editor's Study" columns, views contracts as "agreements of economic significance which are enforceable by public authority" (562). More recent definitions tend not to focus on public enforceability and instead, as P. S. Atiyah suggests, emphasize some sort of promise or agreement.[3] Presently, the *Restatement (Second) of Contracts* defines a contract as a "promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty" (Section 1). However, Atiyah points out that this definition ignores the bargain element of contract:

---

[3] See P. S. Atiyah's *An Introduction to the Law of Contract,* pages 40-44, for a brief account of definitional problems.

"the typical contract is a two-sided affair, something being promised or done on one side in return for something being promised or done on the other side" (*Introduction* 42). Thus, as Rosenfeld notes, the many definitions of a contract "make immediately apparent the elasticity of the concept of contract" (820).

The differences between the present-day *Restatement* definition and the vague language of the nineteenth century treatise writers indicate the well-documented shift in contract law that occurred in the nineteenth century. Some scholars suggest that the turmoil in contract law stems from the extensive social changes, particularly in economic conditions, that occurred around the end of the nineteenth century. Walter F. Pratt argues that contract law radically changed between 1870 and 1920 in response to an increasingly fluid economic market:

> the United States came to recognize itself as having changed from a traditional society, characterized by localism and face-to-face communications, to a modern urban society, characterized by its cosmopolitan nature and by an economy which reached well beyond the village. Intangibly, the society had changed from one in which '[p]resent, past, and future [were] essentially the same' to one in which change and uncertainty were dominant and in which links to the past were weakening. (417)[4]

Pratt also notes that "the new values, unlike the old, could not be readily shared; indeed, because they would exact payment for every exchange, they were the antithesis of

[4] Pratt quotes from Robert Brown's *Modernization: The Transformation of American Life, 1600-1865,* pages 9-13.

sharing" (426). In "The Historical Foundations of Modern Contract Law," Morton Horwitz also distinguishes the old values, determined by eighteenth-century equity courts that considered the "fairness of the underlying exchange," from the new ones that evolved as contract law separated itself from property law (213). The old system, predicated on "the legal and ethical culture of the small town" (243), prevented contract law from addressing commercial transactions which "were difficult to explain with a theory of exchange based on giving and receiving equivalents in value" (236-37). With the realization that socially determined value could not address the speculation of the marketplace, "contract begins to be understood not as transferring title of a particular piece of property, but as creating an expected return" so that contract becomes a mechanism for "protecting against changes in supply and price in a market economy" (227). In this sense, contract provides, if not a complete balance between the present and the future, at the very least some insurance against the risks inherent in a changing market. Individuals, then, may enter legal contracts to gain control of both the present and the future. As Lester L. Lindley suggests, most Americans remain rooted in the present, "imagining a future that beckons but never arrives" (281). By providing a link to a particular time and place, contract "permits a limited measure of self-transcendence as individuals use their vision of what might be to pull themselves from their present circumstances" (281). Thus, in this sense, entering a contract can create a sense of stable self-representation over time even as market forces operate to undermine that self-representation.

The justice of legal contracts can, consequently, be understood from a number of perspectives that stress different areas, such as the terms of the agreement itself and the

actual conditions surrounding the agreement.[5] One approach, classical contract theory, focuses on the autonomy of the contracting parties and views contract as an act of free choice that reflects the will of the parties as manifested by their promises.[6] The moral authority of the contractual obligation stems from this exchange of promises, and the fact that the agent freely chose to enter the contract justifies the results. Thus, the contract is self-justifying. This approach does not, however, consider the bargaining positions of the parties; a contract between a major corporation and a groundskeeper with a third-grade education is considered just simply because both parties freely chose to agree to its terms, even though the corporation might be able to negotiate terms in its favor due to its financial ability to hire a team of lawyers to create the most favorable terms for itself. The parties, then, are considered apart from their particular social and economic situations so that the contract expresses their autonomy.

Another approach, neoclassical contract theory, attempts to account for unequal bargaining positions as well as other inherent problems by evaluating the conditions surrounding the contract, often by asking questions about who benefit from or relied upon a particular exchange. Since most parties are situated differently (and sometimes unequally), morally arbitrary and contingent factors can influence decisions so that parties act heteronomously. This problem calls for independent moral criteria to evaluate

---

[5] See Chapter 3 of Michael J. Sandel's *Liberalism and the Limits of Justice* and Section III of P. S. Atiyah's *The Rise and Fall of Freedom of Contract* for extended discussions of the justification of contracts. In my discussion, I am drawing on Sandel's emphasis on two main ways to justify contractual obligation.

[6] For proponents of this view, see Nozick, *Anarchy, State, Utopia* and Fried, *Contract as Promise*.

the fairness of the exchange itself.[7] As a result, the contract derives its morality from the fairness of the underlying exchange rather than the mere fact that the parties chose to enter the contract and thus willed its terms. Here, a judge would consider whether the corporation and the groundskeeper have entered a fundamentally fair agreement given all the relevant factors such as bargaining position, absence or presence of coercion, and the terms themselves.

Nineteenth-century contract law can also be understood as a part of philosophical shifts within the law more generally. Legal scholars generally divide the evolution of American law from the American Revolution to the end of the nineteenth century into three major periods. From the American Revolution until the early nineteenth century, judges, lawmakers, and lawyers relied heavily on natural law "to provide the foundation for societal values and the legal system, including especially the common law" (Feldman 49).[8] Americans generally followed Blackstone's view that natural law can be discovered through reason or unveiled by God (50). However, natural law faded into the background in the early nineteenth century when an "instrumental conception," akin to utilitarianism, emerged. By 1820,

---

[7] See P.S. Atiyah, *The Rise and Fall of Freedom of Contract*. Atiyah emphasizes benefit-based and reliance-based justifications rather than promise-based justifications for contractual obligation.

[8] Feldman refers to this era as premodern and notes several major characteristics, including "faith in the existence of natural law principles. . .as one definitive feature of premodern American legal thought" (49). Similarly, in "The Emergence of an Instrumental Conception of American Law, 1780-1820," Horwitz accounts for the relationship between common law and natural law during the eighteenth century and notes that "the equation of common law with a fixed, customary standard meant that judges conceived of their role as merely that of discovering and applying preexisting legal rules" (114). For instance, Daniel Dulany describes this process in "The Right of the Inhabitants of Maryland to the Benefit of the English Laws" (1728); he claims "that the Common Law, takes in the Law of Nature, the Law of Reason and the revealed Law of God; which are equally binding, at All Times, in All Places, and to All Persons" (qtd. in Horwitz, "Instrumental" 113).

> judges have come to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. This emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change. (Horwitz, "Emergence of an Instrumental Conception" 143)

According to the instrumental view, law should be considered a means to a specific social end, one often associated with economic progress; as a result, legal science "focused on pragmatic concerns and the instrumental promotion of commerce" (Feldman 76). Feldman sees the instrumental conception of law and its emphasis on progress as the defining characteristic of second stage premodernism: "from 1820 onward, American legal thought was characterized not only by its continuing faith in natural law but also simultaneously by a burgeoning commitment to practical and instrumental decision making" (76). Thus, the principle of utility can provide content for or mirror natural law concepts.

The precarious balance of natural law and instrumentalism shifted during the debates over slavery leading up to the Civil War. For several legal scholars, the Civil War is the defining moment for American law, and both sides marshaled natural law in defense of their views. Feldman explains that the typical view that natural rights are a part of natural law changed so that "natural law and natural rights seemed to split" (87). Antislavery advocates focused on natural rights, particularly an entitlement to personal liberty or property in the person, as the key justification to abolish slavery (Feldman 87; Nelson 169-171). Interestingly, natural law also played a role in support of slavery.

Feldman points out that slave owners often defended slavery as a part of the divine order of human relationships based on status; "natural law imposed a natural order on society, with slaves supposedly entrenched in their proper roles" (87). Due to its emphasis on economic ends, instrumentalist legal reasoning was also associated with pro-slavery arguments and judicial decisions. As Nelson explains, "advocates of compromise with slavery rested their case upon instrumentalist arguments about what was politically wise and economically expedient, whereas opponents of slavery made essentially moralistic arguments about the law of God and the rights of man" (176).

The Civil War and its aftermath presented several challenges for lawyers and judges because both instrumentalism and natural law, however it is defined, were discredited. For Grant Gilmore, at that time, "we find ourselves expelled from our lovely sunlit garden and condemned to wander uncertainly in the law's black night" (*Ages of American Law* 41). According to Feldman, the black night brought about by the Civil War ushers in the modern period in that "the interrelated decline of natural law and rise of positivism generated within jurisprudence a prototypical modernist epistemological problem: the problem of foundations" (91). Yet Gilmore ultimately tags the period an "age of faith" because "never had the idea of law as the ultimate salvation of a free society—a government not of men but of laws—so captured the imagination of any people" (*Ages of American Law* 41). Lawyers and judges turned to a formalist conception of law to provide the foundation law lacked. Nelson describes formalism as

> an amalgam of antislavery ideas and ideas associated with the late nineteenth-century conception of law as a science. What the two sets of ideas had in common was the notion that judges could reason logically and

> deductively—either from first principles of morality or from empirical data which no one could question. Formalism thereby enabled judges to avoid engaging in the sort of utilitarian and political reasoning that had been commonplace to instrumentalism. (181)

Primarily associated with Christopher Columbus Langdell's Deanship of Harvard Law School, formalism seems to offer a reliable foundation for legal decisions. Prior case law provides empirical data with which the lawyer/scientist can work to eventually derive the law. However, as Grant Gilmore points out, this method generally meant that a few lawyers sorted through thousands of cases to find the few cases that are actually decided correctly (*Ages of American Law* 46-7). Gilmore explains that "the doctrine—the one true rule of law—does not in any sense emerge from the study of real cases decided in the real world. The doctrine tests the cases, not the other way around" (47). Thus, the formalist foundation for decision-making seems just as suspect as its natural law and instrumentalist counterparts.

The search for foundations compels Holmes to offer a startlingly bleak view of human nature as one reason why law should emphasize actual experience rather than logic, empirical data rather than morality. In *The Common Law,* Holmes writes that

> the ultima ratio, not only regum, of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will float only one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing. (44)

Holmes advocates an almost complete rejection of Kantian metaphysics, the categorical imperative, and autonomy as an attainable end. In the same chapter on "Criminal Law," Holmes argues, in contrast to Kant's view that people should be treated as ends not means, that the law, quite properly, "treat[s] the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense" (46-7).[9] Similarly, rather than articulating the universal truth of the categorical imperative, "the first requirement of a sound body of law is that it should correspond to the actual feelings and demands of the community, whether right or wrong" (41). Holmes offers a similar rejection of Kant in the chapter on "Possession." One of the problems with contemporary law is its reliance on the "a priori doctrines of Kant and Hegel" that, in Kant's case, can be traced to Rousseau and the Massachusetts Bill of Rights (206). Holmes takes issue with Kant's view that "freedom of the will. . .is the essence of man" because this leads to the conclusion that "possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will. He has extended his personality into or over that object" (207).[10] For Holmes, possession should be determined by external factors rather than a subjective state of mind ambiguously described as intention.

---

[9] Holmes explains that there are, broadly speaking, two justifications for punishment: retribution and deterrence. One view, i.e., Hegel's, suggests that "there is a mystic bond between wrong and punishments" while the other indicates that "the infliction of pain is only a means to an end" (42). According to Holmes, Kant objects to deterrence as a preventative theory because "it treats man as a thing, not as a person; as a means, not as an end in himself" (43). However, even though some object to preventative theories of punishment because it seems "to conflict with the sense of justice and to violate the fundamental principles of all free communities, that the members of such communities have equal rights to life, liberty, and personal security, . . . most English-speaking lawyers would accept the preventative theory without hesitation" (43). Holmes points out that "no society has ever admitted that it would not sacrifice individual welfare to its own existence" (43).

[10] Holmes asks:

> But when does a man become entitled to this absolute protection? On the principle of Kant, it is not enough that he have custody of a thing. A protection based on the sacredness of man's personality requires that the object should have been brought within the sphere of that personality,

In order to focus more directly on empirical data, the law must divorce itself from the morality implied by Kantian absolutes. In "The Path of the Law," Holmes argues that judges and lawyers must separate law from morality to understand better the law; law should be understood as the study of "prediction" because "people want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves" (167). In order to be predictable, the law must establish certain boundaries. He does recognize that "the law is the witness and eternal deposit of our moral life. Its history is the history of the moral development of the race"; this connection creates problems, however, if law is to be understood "as a business with well understood limits, a body of dogma enclosed within definite lines" (170-71). He explains further that "the law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds" (171).[11]

Rights discourse, as Holmes reminds us, is an area that "invites us to pass from one domain to the other" because it often assumes a foundation in natural law as a moral justification: "when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached" (171). Indeed, law sometimes "passes the limits of interference as most consciences would draw it" (171). Thus, he cautions

---

> that free will should have unrestrainedly set itself into that object. There must be then an intent to appropriate it, that is, to make it part of one's self, or one's own. (209)

[11] Holmes believes that in order to know the law "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience" (171).

against "assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law" (172). The rights and duties of law "are nothing but prophecies," he suggests, predictions of what a judge will determine, and legal theory should not "consider the right or the duty as something existing apart from and independent of the consequences of its breach" (168).

Holmes' argument itself at times replicates the blurry boundary between law and morality, especially when he hints, in the essay's concluding sentences, at something that sounds remarkably like natural law:

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law. (202)[12]

As this quotation suggests, at times it is difficult to determine how Holmes reconciles the necessary particularity of law grounded in empiricism with the more universal elements of natural law or Kantian metaphysics.

For instance, the bad man views a legal duty not as a moral principle but as "a prophecy that if he does certain things he will be subjected to disagreeable consequences" (173).

[12] See also Holmes' 1918 essay entitled "Natural Law" in which he argues that "a demand for the superlative. . .is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law" (310). Indeed, he cannot see "any rational ground for demanding the superlative—for being dissatisfied unless we are assured that our truth is cosmic truth, if there is such a thing—that the ultimates of a little creature on this little earth are the last word of the unimaginable whole" (314-15). The closing lines are even more telling: "philosophy does not furnish the motives, but it shows men that they are not fools for doing what they already want to do. It opens to the forlorn hopes on which we throw ourselves away, the vista of the farthest stretch of human thought, the chords of a harmony that breathes from the unknown" (316).

Social contract theory, in its various incarnations, purports to account for both particularity and universality because individuals choose certain terms that then become universally binding. Those terms are authoritative, and therefore just, because autonomous individuals choose to accept them. Thus, justice is served when individuals may exercise those rights without infringing upon the rights of others and without interference from the state. However, social contract theory and classical contract law create almost as many problems as they purport to address.

As I mentioned earlier, social contract theory attempts to negotiate the fundamental tension between freedom and constraint; put another way, presumably autonomous individuals must consent to constraints upon their autonomy so as to preserve their autonomy. In *The New Social Contract,* Ian MacNeil notes an "internal conflict" in "contract roles" that "results from the desires to maximize immediate selfish gains and to create and maintain social solidarity with other participants" (42). Thus, even as contract theory provides a technology of autonomy and self-definition, it also constitutes a stabilizing force that, however necessary, can frustrate the self-realization it promises. In order to preserve this emphasis on consent and individual will as well as to limit constraints, both the social contract and classical contract theory posit an agreement *ex nihilo*; that is, the contract presumes its own "generality, that it could be stated at a high level of abstraction, and that the law applied indifferently to all kinds of contracts irrespective of subject-matter" (Atiyah, *Rise and Fall* 400). For Rosenfeld, the purpose of such abstraction "is to provide a *tabula rasa* from which the new paradigm of contractual relations can emerge, so to speak, out of nothing" (823). However, as Rosenfeld points out, "for contract to be perceived as being created *ex nihilo,* it was first necessary to

dismantle the preexisting network of social relations that had established positive obligations among individuals" (822). Thus, contracts also reflect another tension, here the tension between an existential, ahistorical model of obligation and a cultural geneology of relationships that are always already embedded within a web of complex relationships. Given such abstraction, it is not surprising that contracts must negotiate a gap between theory and practice. Autonomous individuals, who enter exchanges divorced from material reality, embody hypothetical freedom of contract that always exists in theoretical tension with the material conditions within which that freedom must be practiced.

Indeed, several prominent literary critics point to the limitations of classical liberalism, a political theory closely associated with Locke's account of the social contract, as well as classical contract theory by addressing how various authors critique or reinforce these theories as ideologies. Amy Kaplan argues that works of realism, in particular, are socially engaged. For Kaplan, "realists more than passively record the world outside; they actively create and criticize the meanings, representations, and ideologies of their changing culture" (7). In a similar vein, Alan Trachtenberg claims that "realism portrayed the old American credo of a community of autonomous individuals as a sad illusion" (202). Concentrating on naturalism, Walter Benn Michaels' *The Gold Standard and the Logic of Naturalism* also explores the relationship between literary texts and their cultural contexts and specifically addresses economic conditions and to a lesser extent contract law. Michaels also devotes an entire chapter to "The Ideology of Contract" wherein he argues that Frank Norris' *McTeague* implies a masochistic sense of contract predicated on the liberal notion of self-ownership. Michaels explains that

> an increased investment in the values of autonomy will naturally be accompanied by an increased insecurity about the status of that autonomy; a self that can be owned can also be sold or stolen or gambled away. (124)

For Michaels, contract theory provides only an illusory model of autonomy. Rather than embodying freedom, contracts actually conceal and even legitimate power relationships.[13]

These limitations of contract theory as well as classical liberalism in general continue to be relevant to contemporary political debates. In an attempt to address the conflict between individual self-interest and public interest, some political theorists examine the proliferation of rights-claims in contemporary America. For instance, in *Rights Talk: The Impoverishment of Political Discourse*, Mary Ann Glendon argues that the modern emphasis on rights "proves inadequate, or leads to a standoff of one right against another" (x). Glendon does not believe that the problem lies with "the notion of rights or with our strong rights tradition"; instead, the use of rights discourse in the latter part of the twentieth century creates the problem-- "its silence with respect to personal, civic, and collective responsibilities" (x). The current version of rights "distorts American culture" because it "captures our devotion to individualism and liberty, but omits our traditions of hospitality and care for the community" (xii). For Glendon, the solution lies in the "renewal of our strong rights tradition" with a renewed emphasis on the role of the community (xii).

---

[13] Here, Michaels follows Karl Marx's critique of contract as an ideology of oppression. For instance, in *Capital*, "the Roman slave was held by fetters: the wage laborer is bound to his owner by invisible threads. The appearance of independence is kept up...by the *fictio juris* of a contract."

Like Glendon, Michael Sandel also turns to the community in an effort to ameliorate the injustices of classical liberalism as well as John Rawls' more recent statement of political liberalism. In *Liberalism and the Limits of Justice*, Sandel mounts a communitarian critique that targets Immanuel Kant and John Rawls' twentieth-century restatement of "deontological liberalism" which posits that

> Society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize social welfare or otherwise promote the good, but rather that they conform to the concept of *right*, a moral category given prior to the good and independent of it. (1, emphasis in original)

Sandel emphasizes classical liberalism's tendency to justify principles of justice without positing a theory of the good as a foundation so that the principles "are independently derived" (2). This tendency reflects a Kantian notion of the subject as prior to its ends, and Sandel wonders whether or not the primacy of the subject and, ultimately, the primacy of justice can be adequately defended (7). For Sandel, the liberal version of the subject as prior to its ends fails to account for the possibility of intersubjective and intrasubjective forms of identity. An intersubjective view of the self considers relationships with other individuals and social institutions as important components of individual identity in that the self cannot exist prior to and apart from particular "obligation[s] to a family or community or class or nation" (62). An intrasubjective view of the self, in turn, recognizes a "plurality of selves within a single, individual human

being, as when we account for inner deliberation in terms of the pull of competing identities, or moments of introspection in terms of occluded self-knowledge" (63). For Sandel, liberalism cannot explain broader conceptions of the self, and the limits of justice reside "in the partiality of this self-image" (11). Sandel concludes that

> justice as fairness fails to take seriously our commonality. In regarding the bounds of the self as prior, fixed once and for all, it relegates our commonality to an aspect of the good, and relegates the good to a mere contingency, a product of indiscriminate wants and desires 'not relevant from a moral standpoint.' (174)

Sandel's work suggests that the liberal conception of the self and by extension justice raise certain problems.[14] Self-interested motives are often at odds with the idea of justice itself, and communitarian thinkers such as Sandel believe that the primacy of justice would be misplaced in a system emphasizing different values such as virtue, social interaction, and compassion for others. [15]

The issues raised by Sandel and Glendon seem even more problematic when addressed by postmodern and poststructuralist theorists, such as Jacques Derrida, Michel Foucault, and Jean-Francois Lyotard, who, generally speaking, question the concept of an autonomous agent capable of making rational choices and thus choosing his or her own

---

[14]For Sandel, Rawls' version of liberalism "cannot be rescued from the difficulties associated with a Kantian subject" (14). Consequently, "Rawls' attempt to situate the deontological self, properly reconstructed, carries us beyond deontology to a conception of community that marks the limits of justice and locates the incompleteness of the liberal ideal" (14).

[15] In *Varieties of Moral Personality*, Owen Flanagan provides an excellent overview of the debate between liberals and communitarians, and highlights some common ground. However, Flanagan remains quite skeptical about the communitarian conception of identity as intersubjective. He suggests that

ends. For these theorists, the self is entirely socially constructed, and agency itself becomes an illusion. According to these theorists, the state, as well as other social institutions, also comes under fire because the state, rather than creating the best conditions in which individuals can make ethical decisions as classical liberals and even Marxists would have it, is conceived of as a totalizing force that suppresses or disciplines difference. Consequently, the coherence of any justice system or claims to justice depends upon suppressing the Other, the element that always lies just beyond the structure of meaning.

Such criticism raises an important question: What are the possibilities for a conception of justice, a means to negotiate rights and wrongs, that does not sacrifice the particularity of the Other to the universal realm of general principles or norms? What version of identity is necessary for such a conception of justice, whatever that conception may turn out to be?

Both Habermas and Rawls suggest ways we might find common ground without sacrificing the particular to the universal or positing a universal foundation for moral and ethical decision-making. As Charles Altieri points out,

> Even though we can no longer debate the incommensurable epistemological principles informing our critical commitments, we may be able to find common grounds for assessing the ethical values that critical positions inculcate and the self-representations they allow us to give our actions as we pursue those commitments. (61)

---

intersubjective identity "is of dubious desirability...when it is pictured as overly confident of its own values and closed to the worth of alternative value systems" (107).

In particular, Altieri highlights the power of Rawls' account of reflective equilibrium as a means to negotiate the tension "between the concerns that engage individuals in moral issues and the actual abstract principles that shape public decision making" (78). Further, in *Between Fact and Norm*, Habermas suggests that legal discourse can play an essential role in locating common ground in that "normatively substantive messages can circulate *throughout society* only in the language of the law" because law is particularly situated in a way that "is equally open to lifeworld and system" (56, emphasis in original).

In this study, I will argue that Louisa May Alcott, William Dean Howells, Henry James, and Edith Wharton frequently utilize legal discourse to dramatize the complicated convergence of legal and ethical claims. For many of the characters I will discuss in the following chapters, constructing oneself as a just person seems important, especially as a way of providing reasons for specific actions; however, such a constructing necessarily relies on an external standard of justice based on rights, duties, and/or social ends. As Habermas points out, validity claims, that is, claims that assert their own justification, are "Janus faced" because "as universals, they outstrip every given context; at the same time, they must be raised and gain acceptance here and now if they are to sustain an agreement capable of coordinating action" (*Justification and Application* 146).[16] Thus, to claim validity, agents must operate both on the level of the universal and the particular to justify themselves as moral and ethical.

---

[16] More specifically, "a validity claim says that the conditions of validity of an utterance—be it an assertion or a moral command—are satisfied, something that cannot be shown by direct appeal to decisive evidence but only through discursive redemption of the claim to prepositional truth or normative rightness" (Habermas, *Justification and Application* 29).

I hope to explore this give and take in subsequent chapters through a close reading of legal discourse in selected works of Alcott, Howells, James, and Wharton. In *Poetic Justice,* Martha Nussbaum suggests that "narrative literature" has "the potential to make a contribution to the law in particular, to public reasoning generally" (xv). For Nussbaum, literature provides "the ability to imagine what it is like to live the life of another person who might, given changes in circumstance, be oneself or one of one's loved ones" (5). In a similar sense, an understanding of law can help us better contemplate the material conditions of lives we seek to imagine because law shapes the lives we hope to understand.

Before turning to specific literary works in later chapters, this project will provide a brief survey of the philosophical origins of legal discourse, particularly the language of contractual obligation and rights claims, in social contract theory. In Chapter One, I will explore the development of social contract theory and provide definitions of its major terms. While it is not my intention to offer a comprehensive analysis of every major theory on this subject, I will provide a basic account of a few key works so that readers can, I hope, develop some understanding of relevant concepts. Through an exploration of the broad, historical development of the contractual model of justice, I will present the various definitions of contract, rights, and justice relevant to my project and so clarify the connections among these concepts.[17] In Chapter One, then, I will review appropriate

[17] In its most basic form, the contractual model of justice attempts to balance the tension between self-interest, indicated by the emphasis on individual liberty, freedom, and rights associated with classical liberal conceptions of justice, and the emphasis on public interest, indicated by various social considerations privileged by Marxist and even utilitarian ideas about justice. Very generally, most political theories can be divided into three major categories: rights-based, duty-based, and goal-based; and thus social policy and even individual decisions are morally and ethically justified by referring to rights, duties, or ends. According to Ronald Dworkin, rights-based theories, like those of John Locke and Thomas Paine,

works of social contract theorists, including Hobbes, Locke, Rousseau, and Kant, and their critics, such as Hegel, Marx, and Bentham. During this review, I will follow these theorists' consistent use of masculine nouns and pronouns throughout: none of these theorists ever imagined that the concepts discussed would apply to women. Feminists from numerous camps critique virtually the entire Western philosophical tradition for its sexism, and I will address the specific problems for women in Chapter Two within the context of Alcott's work. After briefly outlining the social contract tradition and illuminating its fundamental tensions, I will then review major threads in John Rawls' *Theory of Justice* and give some attention to recent responses to and critiques of Rawls, particularly Jűrgen Habermas' efforts to address the concerns of postmodern and poststructuralist critics such as Jean Francois Lyotard, Jacques Derrida and Michel Foucault who are suspicious of any attempt to ground ethical or moral decisions on foundational knowledge and universal principles.

After a brief exploration of the contractual model of justice in Chapter One, Chapter Two will address Louisa May Alcott's use of legal discourse in "M. L.," "A Whisper in the Dark," *Work,* and *A Modern Mephistopheles* to advance a feminist project and to suggest the need to extend specific legal rights to women and people of color. However, Alcott also recognizes, particularly in " A Whisper in the Dark" and *A Modern Mephistopheles,* that legal reform alone may not guarantee just social relationships. In this chapter, I will rely on Carole Pateman's *The Sexual Contract* to explore possible

---

focus on a particular right as fundamental; duty-based theories, like that of Immanuel Kant, assume that obeying certain duties, such as God's will or another universal maxim, is fundamental; and goal-based theories, such as utilitarianism, Aristotelian perfectionism, Marxism, or even fascism, consider some teleological end as fundamental (171-2). I have added Locke and Marx to Dworkin's list.

reasons why contracts often seem paradoxical in Alcott's work. Like Alcott, William Dean Howells also seems well aware of the paradoxes of contract theory, and Chapter Three will investigate Howell's exploration of contract as a vehicle for self-realization in *A Modern Instance* and *A Hazard of New Fortunes.* Both of these texts suggest that, given the pressures of capitalism, contract offers not individual autonomy but provisional agency.

The relationship between contract and justice, rendered problematic by Alcott and Howells, is extensively critiqued by Henry James and Edith Wharton. In Chapter Four, I will highlight James' use of legal discourse to describe his aesthetic practice. I will also explore James' attention to contractual obligation and rights in *The Portrait of a Lady* and *The Wings of the Dove* and suggest that for James legal discourse provides the means to critique the contractual model of justice for its abstraction. Chapter Five analyzes Wharton's use of legal discourse in *The House of Mirth, The Reef, Summer,* and *The Children* to foreground both the right to make contracts and the justice of those contracts. Indeed, Wharton employs legal discourse to describe relationships between characters and to indicate how characters see themselves. Finally, in my Conclusion, I will assess this project.

CHAPTER ONE

The Social Contract: Critique and Revival

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."
Thomas Jefferson, Declaration of Independence

These now familiar phrases encapsulate the political philosophy upon which the United States of America was formed, and the concept of "unalienable Rights" still seems politically viable well over two hundred years later. As Ronald Dworkin writes,

> The language of rights now dominates political debate in the United States. Does the Government respect the moral and political rights of its citizens? Or does the Government's foreign policy, or its race policy fly in the face of these rights?. . .It is not surprising that these questions are now prominent. The concept of rights, and particularly the concept of rights against the Government, has its most natural use when a political society is divided, and appeals to cooperation or a common goal are pointless. (184)

As Dworkin suggests, rights claims occupy a prominent role in public debate. Indeed, the typical evening news broadcast often presents story after story of individuals or groups asserting certain rights or claiming that rights have been violated. Many of these rights claims appeal to the familiar protections of the Bill of Rights of the United States Constitution: controversial artists, such as musicians whose songs depict graphic sex, violence, or other material that some might find problematic, assert their first amendment

right to free speech; gun owners assert their right to bear arms; advocates of school prayer justify their position by appealing to the right to the free exercise of religion. Similarly, rights are often invoked as an appeal to fair treatment. For instance, disenfranchised voters claim that their right to vote has been violated, or an individual accused of committing a crime depends on his or her right to an attorney to ensure legal representation. However, such rights claims are sometimes countered by claims to rival rights, and productive debate does not occur because the conversation stops when rights are invoked. In a notable example, opposing sides of the abortion debate make claims grounded on either a woman's right to choose or a fetus's right to life. Similar logic also governs many debates at the international level as numerous organizations work to secure what can broadly be termed "human rights." However, these universal human rights often come into conflict with the specific practices of local cultures. To complicate matters further, rights claims are not confined to specifically legal contexts in which positive law recognizes specific rights. Indeed, some rights claims, such as the right to happiness, also appeal to principles that are not explicitly guaranteed by positive law.

All of the above examples certainly indicate the prevalence of rights claims; yet, despite this reliance on rights discourse to describe human needs and desires as well as specific legal claims, the meaning and significance of rights discourse remains unclear. Given its broad range of application, a "right" can seem free-floating and detached from its philosophical context. As a result, we tend to forget that many of the rights we take for granted, such as those articulated in the Bill of Rights and The Declaration of Independence, were negotiated in terms of a social contract in which, generally speaking, autonomous individuals agree to form a society complete with a governing body and

various other social structures. Social contract theory offers several approaches to structure the relationship between the individual and the group. On one hand, individual rights are created by the contract, and the only rights that will be recognized and enforced are those articulated by positive law. Individuals agree to give up certain rights, typically natural rights that do not depend on a contract, in exchange for the benefits of living in civil society and the security of rights created by positive law. On the other hand, some theories—John Locke's is a notable example—suggest that natural rights exist prior to the contract, and these rights constitute "inalienable rights," to use the language of the Declaration of Independence, that cannot be contracted away with the formation of society. Rights discourse, then, remains caught in and helps to perpetuate a viscous circle: Do contracts justify rights? Do rights justify contracts?

While it is unlikely that such far-reaching questions will be definitively resolved here, it is important to consider the philosophical origins of rights claims in order to understand better the role of such discourse in the literary works I will examine in subsequent chapters. Rights claims provide compelling examples of legal discourse in the works of Alcott, Howells, James, and Wharton; when these writers use legal discourse, particularly the language of contractual obligation and rights, they implicitly invoke a philosophical tradition fraught with tensions, tensions that many of their works both reflect and critique these tensions. In this chapter, I will provide a brief survey of the history of social contract theory by reviewing the work of some of its advocates—particularly Hobbes, Locke, Rousseau, and Kant—and its critics such as Hegel, Marx, and Bentham.

Generally speaking, social contract theory promises hypothetical freedom and a stable future even as real-world, material conditions, such as the legal status of individuals and economic conditions in general, limit the practical import of that theory for some individuals or groups. Even as Jefferson penned the Declaration of Independence, many people—including women, people of color, and unpropertied men—lacked the legal status necessary to participate even in the promise of such freedom. Similarly, as a hypothetical agreement, the social contract exists without reference to history even though it is embedded within a particular cultural geneology. These tensions between theory and practice play out in dramatic ways with reference to subjectivity. Simply put, the social contract marks the path to individual autonomy and self-definition at the same time that it may hinder the very self-realization it seems to offer.

As the introductory quotation from the Declaration of Independence indicates, the so-called "consent of the governed," often embodied in a contract, plays an important role in creating a society that attempts to strike a balance between individual self-interest and public interest. Seventeenth- and eighteenth-century political theorists, particularly John Locke, greatly influenced Jefferson's conception of rights presented in the Declaration of Independence. For Jefferson, the rights to "life, liberty, and the pursuit of happiness" are natural rights because they represent "self-evident" "truths." According to Peter Jones, John Locke's version of natural rights generally depicts individual rights as "essentially negative in character" (79). As a result, these rights constitute "'keep out' notices" proclaiming "that each individual should be left free to worship God in his own way, to express his own thoughts, to tend to his property, without interference from others, particularly without interference from the state" (79). Thus, social contract theory

offers the possibility of structuring society without imposing any particular conception of the good on individual members of that society. However, by relying on negative freedom, the *freedom from* intrusions by others, social contract theory, for many critics, presents an impoverished view of human relationships. Hegel, Marx and others posit instead a positive conception of freedom that is conceived in and through one's relationships with others. Positive freedom, then, emphasizes the *freedom to* attain self-fulfillment through involvement in the community and the political process.

The generalized conception of the social contract originates in various sources, and scholars debate the extent of many philosophers' influence on the American version and its representation of the citizen and his rights and responsibilities. In terms of public popularity in eighteenth-century England, Locke is the most well-known of the major theorists. Lawrence Stone asserts that "Hobbes was largely without influence, and it was Locke, who built his society on a compact of individuals for the preservation of their private properties, who was the popular theorist for the post-1688 Whig state" (231). Certainly, Locke's influence on the American model is significant.[1] Kevin L. Cope argues that Locke could be "described as a founding father of America" (123). More specifically,

> Locke's influence on Thomas Jefferson was especially strong and extensive. Jefferson esteemed not only the political but also the natural-

[1] As early as 1922, Carl Becker suggested that Jefferson drew heavily on Locke's ideas as he wrote the Declaration of Independence. Becker points out that "most Americans had absorbed Locke's works as a kind of political gospel; and the Declaration, in its phraseology, follows closely certain sentences in Locke's second treatise on government" (27). Though John Dunn later critiqued this view in "The Politics of Locke in England and America in the Eighteenth Century," more recent work by Wooten reinforces Becker's claims. See Hans Aarrslif's chapter "Locke's Influence" in *The Cambridge Companion to Locke.*

> historical, theological, and philosophical acumen of the archempiricist. Benjamin Franklin and most of the other colonial-era American intellectuals and self-made men were not far behind Jefferson in applauding the polymathic Locke. (Cope 124)

In a May 8, 1825, letter to Henry Lee, Jefferson notes that the Declaration is "intended to be an expression of the American Mind," and he acknowledges that "Aristotle, Cicero, Locke, Sidney" influenced its principles (Ford 343-44). In *Puritanism and Democracy*, Ralph Perry attributes Locke's influence to his role as "the greatest and most representative exponent of the Enlightenment—which, arising in England in the seventeenth century, gave a distinctive character to the mind of Europe and America in the century that followed" (126).

Before turning to Locke's work, it is important to understand the theoretical context within which he wrote. One important predecessor is Thomas Hobbes, who uses social contract theory to legitimate a monarchical form of government. Hobbes bases his theory on a descriptive account of human nature reflected by the condition of man in the State of nature. In *The Leviathan,* Hobbes envisions completely self-interested individuals who fight to acquire what they need to survive. Accordingly, he suggests that the "general inclination of all mankind" is "a perpetual and restless desire of power after power, that ceaseth only in death" (66). This inclination typifies man in the State of nature, where the "condition of man. . .is a condition of war of every one against every one. . .[;] every man has a right to every thing; even to one another's body" (86-87).

For extended discussions of this debate, see Donald S. Lutz, *The Origins of American Constitutionalism* and Steven M. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution.*

Despite this state of perpetual war, men do have certain rights in the State of nature; however, these rights merely perpetuate the state of war itself. For Hobbes, the principal "right of nature" is one of self-preservation as each man has the "liberty" to "use his own power, as he will himself, for the preservation of his own nature" (86). As long as "this natural right of every man to every thing" exists, "there can be no security to any man" (87). This leads Hobbes to "the fundamental law of nature": "that every man ought to endeavor peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war" (87).

Since nature makes men virtually equal to each other in ability, some sort of agreement is necessary to secure peaceful coexistence, so Hobbes offers a second law of nature: that in order to secure peace, a man should "be willing. . .to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself" (87). Hobbes posits "the mutual transferring of right" through "that which men call a contract" (89). Prior to entering this contract, justice and injustice do not exist. Hobbes writes:

> And in this law of nature, consisteth the fountain and original of justice. For where no covenant hath preceded, there hath no right been transferred, and every man has right to every thing; and consequently, no action can be unjust. But when a covenant is made, then to break it is unjust: and the definition of injustice, is no other than the not performance of covenant. (95)

The contract becomes the central tool to define justice and thus structure individual rights and obligations in civil society; without contract, justice and injustice simply do not exist.

Once the contract is formed, someone or something must enforce it. For Hobbes, rights originate through contract rather than in an a priori, transcendental source such as natural law. Hobbes writes that contracts, or bonds as he often calls them, "have their strength not from their own nature, (for nothing is more easily broken than a man's word,) but from fear of some evil consequence upon the rupture" (88).[2]

Like Hobbes, John Locke views the social contract as a means through which individuals may gain some control over social and political structures; however, Locke emphasizes the role of natural law in determining those structures and provides a different take on the individual. Locke bases political authority directly on the consent of individuals who agree to relinquish the right to enforce their natural rights in order to maximize their ability to exercise natural rights within civil society.[3] Prior to entering civil society, individuals exist in a state of nature that, unlike Hobbes' version, is for Locke "a state of perfect freedom to order their actions as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any

---

[2] Hobbes also argues that "covenants, without the sword, are but words, and of no strength to secure a man at all" (111).

[3] For many theorists, Locke's view of consent is quite problematic. In "Of the Original Contract," Hume recognizes that even though the first government probably was founded on an original contract representing the consent of the original subjects, this original contract has been "obliterated by a thousand changes of government and princes" and "cannot now be supposed to retain any authority" (151). Hume is also troubled because "this assumes the consent of the fathers to bind the children, even to the remote generations" (151). Hume addresses Locke's notion of tacit consent when he asks the following:

> Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the domination of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her. (156)

Consent, then, requires some sort of free choice, a choice clearly denied subjects in most real-world governments. For Hume, government is legitimate because "men could not live at all in society, at least in civilized society, without laws, and magistrates, and judges, to prevent the encroachments of the strong upon the weak, of the violent upon the just and equitable" (161). For more recent responses to Locke's view of consent, see Pitkin's articles, "Obligation and Consent I" and "Obligation and Consent II."

other man" (Locke, *Second Treatise* 262). Rather than a Hobbesian war of all against all, Locke describes a state of absolute freedom in which natural law demands that this freedom should be recognized, to the extent possible, by others. The law of nature transcends empirical experience; it "obliges everyone," and "reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions" (264). Both Hobbes and Locke, then, imply a negative version of freedom in that individuals have a natural right to be free from the interference of others. Thus, "all men may be restrained from invading others' rights, and from doing hurt to one another" (264), for the law of nature also suggests a natural duty not to harm other people and provides a moral foundation to guide individual actions. Unlike Hobbes, Locke does not believe that moral authority rests with the sovereign.

Property represents the heart of this moral guide, primarily since the natural rights guaranteed by the law of nature are closely linked to property rights. Typically, property rights suggest ownership of things such as land, jewels, crops, and horses that are external to the person. However, Locke broadens this theory to include the individual person within the definition of property. In the state of nature, all men are free to "dispose of their possessions and persons as they think fit, within the bounds of the law of nature" (262). With this claim, the person seems analogous to a possession. Locke is even more explicit in his chapter "On Property" in which he asserts that " every man has property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands. . .are properly his" (274). The individual may also mix

his labor with resources found in the state of nature and thus gain property rights to those resources; that is, Locke argues that "he that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself" (274-75). In this system, individuals no longer must rely on inherited wealth to ensure success as they may enjoy the fruits of their own labor. Also, this property right in the person suggests an inviolable, completely autonomous self, a protected space for individual self-fulfillment that even the positive laws of civil society cannot arbitrarily broach—a self protected by negative freedom, by the right to be left alone.[4]

Unfortunately, men do not always follow this moral guide, and conflicts between individuals arise in the state of nature; indeed, the "enjoyment of it [the state of nature] is very uncertain, and constantly exposed to the invasion of others" (324). Locke argues that "for all men being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure" (324). When these natural rights are threatened in the state of nature, all men have the right to enforce the law of nature, "for in that state of perfect equality. . .what any may do in prosecution of that law, everyone must needs have a right to do" (264). These conflicts raise questions of justice because "he who was unjust as to

---

[4] In *Possessive Individualism,* C.P. MacPherson argues that "Locke's astonishing achievement was to base the property right on natural right and natural law, and then to remove all the natural law limits from the property right" (199). He echoes Marx's critique of liberalism when he argues that property rights also create a sense of property in the person that divides the individual from the community. Like Marx, MacPherson believes that the individualism characteristic of liberal theory has a problematic "possessive quality" that "is found in its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them" (3). As a result, the individual is "seen neither as a moral whole, nor as a part of a larger social whole, but as an owner of himself" (3).

do his brother an injury will scarcely be so just as to condemn himself for it" (267). Locke also concedes that "it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends" (267).

To satisfy this need for justice and "for the mutual preservation of their lives, liberties, and estates [referred to generally by Locke as property]" (325), Locke posits a civil government justified by a social compact: "men being. . .by nature all free, equal, and independent, no man can be put out of this estate and subjected to the political power of another without his own consent" (309).[5] The primary ends of entering such an agreement are the "preservation of their property" (325) and the establishment of some standard of justice. Indeed, justice is best served when property is protected. Civil society will provide certain things that were lacking in the state of nature such as a "common measure to decide all controversies," "a known and indifferent judge," and "power to back and support the sentence" (325). Most importantly, citizens of civil society give up the right to enforce the law of nature; thus, the citizen relinquishes "his power to punish offences against the law of nature in prosecution of his own private judgement" (304). However, the citizen does not give up the natural rights inherent in the law of nature, and as a result, "the power of the society. . .can never be supposed to extend further than the common good" (327). Since natural rights follow the individual into civil society, natural rights limit the state's authority. For instance, positive law created by the legislature should be consistent with natural law; Locke writes that "the law of nature stands as an

[5] For Rousseau, much like his predecessors Locke and Hobbes, "the passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they formerly lacked" (195).

eternal rule to all men, legislators as well as others. . . .The rules they make for other men's actions. . .must be conformable to the law of nature" (330).

The theories of both Locke and Hobbes suggest the necessity of some form of social cooperation, if only to facilitate the pursuit of individual self-interest; however, once individuals enter contracts and obligate themselves to others, those very obligations may undermine the interests the contracts were designed to secure. Thus, contract theory contains within itself a fundamental tension: the autonomous individual must voluntarily consent to some constraints upon his autonomy. Similarly, both Locke and Hobbes raise questions about the relationship between the individual and society: Can a contractual model account for all relationships with others? Do some relationships exist outside or prior to contractual one? Does a contractual model provide justice according to its own terms? Though social contract theory, in general, attempts to negotiate some sort of equilibrium between individual autonomy and social cooperation, this negotiation is not always successful. Locke's version, for instance, privileges the individual to protect individual rights, often at the expense of ethical considerations of duty to others and broader social goals advocated in ends-based theories such as utilitarianism and Marxism. Similarly, Locke's emphasis on private property assumes that individuals occupy similar socio-economic positions that implicitly facilitate autonomy, and in this respect, Locke does not foresee how the material conditions created by capitalism will heighten the tension, inherent in his theory, between hypothetical freedom and the practical exercise of that freedom in particular situations.

Given these inherent tensions, Jean-Jacques Rousseau, for one, critiques social contract theory, especially Locke's version with its emphasis on private property and

fundamentally self-interested individuals. For Rousseau, both Locke and Hobbes provide inadequate theories because they focus on the protection of individual rights as the primary social goal and thus privilege individual interests and desires rather than the common good. Rousseau, in contrast, calls attention to classical civic virtue to restore a more complete version of citizenship than that envisioned by Hobbes or Locke. According to Rousseau's *The Social Contract*, contemporary governments are illegitimate and reinforce inequality, so he must account for the disconcerting reality that "man is born free; and everywhere he is in chains" (181). Rousseau begins his discussion with a question about government: "What can make it legitimate?" (181). To answer this question, Rousseau first directs attention to the state of nature. He believes that philosophers such as Locke and Hobbes provide misguided conceptions of man in the state of nature and that these fundamentally negative views of human nature and human freedom contribute to the flaws in their theories; Rousseau writes that philosophers who dwell on "wants, avidity, oppression, desires, and pride [have] transferred to the state of nature ideas which were acquired in society" (*Discourse on the Origins of Inequality* 50). For instance, Hobbes' assumption that men are constantly at war in the state of nature really describes men and nations who are constantly at war in so-called civil society. Though Rousseau finds it difficult to imagine what man must have been like before entering civil society, he does sketch the evolution of natural man into civilized man through several stages; Rousseau's "natural man," while he does want to fulfill his own desires, "is restrained by natural compassion from doing any injury to others" (91). Indeed, compassion and pity are stronger in natural man than in civilized man and give way to self-interest as man evolves from one stage to the next; at some point during this

process, "this expansion of the human faculties, keeping a just mean between the indolence of the primitive state and the petulant activity of our *amour-propre,* must have been the happiest and most stable of epochs" (91). Unfortunately, this expansion did not stop when it achieved this balance; though "all subsequent advances have been apparently so many steps towards the perfection of the individual," Rousseau writes, these advances tend "in reality towards the decrepitude of the species" (91). As he explains, reason "turns man's mind back upon itself, and divides him from everything that could disturb or afflict him. It is philosophy that isolates him, and bids him say, at the sight of the misfortunes of others: 'Perish if you will, I am secure'" (75). For Rousseau, enlightenment reason then impedes rather than encourages individual perfection.

In *The Social Contract,* Rousseau suggests that once men leave the state of nature to form civil society and create a "social order" that is itself "a sacred right which is the basis for all other rights" (182), this sacred right must be secured. Thus, Rousseau argues that this right should "be founded on conventions" and that the social contract is the origin of all rights (182).[6] Rousseau reduces the contract to a single clause: "the total alienation of each associate, together with all his rights, to the whole community" (191). Each individual becomes part of a "corporate and collective body" that replaces "the individual personality of each contracting party" (192). The body politic possesses what Rousseau calls the "general will" that preserves the "welfare of the whole and of every part, and is the source of laws, constitutes for all the members of the State, in their

[6] Rousseau writes, "since man has no natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men" (185). For Rousseau, natural liberty is limited by individual strength while civic liberty "is limited by the general will" (196).

relations to one another and to it, the rule of what is just or unjust" (*Discourse on Political Economy* 132). Indeed, individual will is subsumed into the general will so that the general will manifests common interests of the community. This attention to common interests makes private property difficult to justify, and Rousseau suggests that private property becomes a major source of inequality. For Rousseau, "every man has naturally a right to everything he needs" (*Social Contract* 197), and while individuals can acquire property, "the right which each individual has to his own estate is always subordinate to the right which the community has over all" (199). Through the social contract, man "gains civil liberty and the proprietorship of all he possesses" (196). Perhaps most importantly, the civil state affords man "moral liberty, which alone makes him truly master of himself" (196). However, even as Rousseau claims that only in civil society can man master himself, the transition to civil society seems to require the loss of self-mastery to the general will. In this sense, Rousseau's theory, like that of Hobbes and Locke, reflects a fundamental paradox of contract: in order to preserve freedom through contract, one must agree to the potential destruction of that freedom.

Like Rousseau, Immanuel Kant also focuses on the moral implications of the social contract; however, Kant believes that enlightenment reason facilitates the public use of reason to deliberate about political issues as well as moral dilemmas. Indeed, Kant believes that human intentions can be rationally justified. Hans Reiss explains that political theory and morality go hand in hand for Kant because "politics deals with the question of what we ought to do in our social and political context, or in other words, it is concerned with establishing criteria by which we can settle our public conflicts of interest" (20). In "On the Common Saying: 'This May be True in Theory, but it does not

Apply in Practice,'" Kant responds directly to Hobbes' version of the social contract and suggests, like Locke, that "people. . .have inalienable rights against the head of state" (84). However, these rights do not seem to originate in natural law; Kant offers instead a theory "founded on the concept of duty" to avoid "the empty ideality of the concept" (62). Kant argues that man "must in all his actions. . .be regarded at the same time as an end" (qtd. in Reiss 18). Thus, Kant provides a categorical imperative: "act always so that you treat humanity whether in your person or that of another always as an end, but never as a means only" (qtd. in Reiss 18). In keeping with his view of moral action, Kant distinguishes between empirical reality and normative standards, and argues that "all is lost if the empirical (hence contingent) conditions governing the execution of the law are made into conditions of the law itself" (63). In moral terms, the individual must "ensure that no *motive* derived from the desire for happiness imperceptibly infiltrates his conceptions of duty" (64). Duty "occasions a new end for the human will, that of striving with all one's power towards the highest good possible on earth, towards the universal happiness of the whole world" (65).

Thus, Kant presents the social contract as "an idea of reason" (79) that is "concerned. . .primarily with the rights which would thereby be secured for everyone" (80). Instead of representing actual historical circumstances, the social contract operates as a device to evaluate the justice of law. As Kant explains, the social contract "can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of the whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will" (79). Because people possess a will, they can choose their own actions and thus act in a morally

responsible manner. Kant's conception of morality is important here because he believes that the moral nature of man can be realized through law:

> The maxim of absolute obedience to a categorically binding law of the free will (i.e. of duty), without reference to any ulterior end, is essentially different (i.e. different *in kind*) from the maxim of pursuing, as a motive for a certain way of acting, the end which nature itself has imposed upon us and which is generally known as happiness. For the first maxim is good in itself, but the second is not. The second may, if it conflicts with duty, be thoroughly evil. (67)

The central issue, then, is determining the proper relationship between law and freedom. As Reiss puts it, Kant believes that "man should not merely be subject to another will, but he should be his own law-giver" (19). Kant writes, "act always in such a way as if you were through your maxims a law-making member of a universal kingdom of ends" (qtd. in Reiss 19). On both the individual and social level, these categorical imperatives provide a way to judge the morality of actions. Thus, as Howard Williams explains it, Kant's assumption that "our behaviour can be made internally consistent and universally applicable. . .applies both to legal rules and the rules of virtue which externally and internally restrict our actions" (132-33).

Kant's reliance on the categorical imperative to define legal and ethical obligations to others troubles several of his successors. G. W. F. Hegel, in particular, advances a rigorous critique of the empty formalism of Kant's system (*Philosophy of Right* 89-90). For Hegel, the categorical imperative requires us to do our duty without telling us the precise content of that duty. To remedy this problem, Hegel particularizes

duty by providing his version of the ethical life, "the Idea of freedom" (105). Freedom can only be realized in the state which Hegel sees at the ultimate form of community. Ethical life, lived in and through the state, involves the union of the general and the particular will so that "in this identity of the universal will with the particular will, right and duty coalesce, and by being in the ethical order a man has rights so far as he has duties, and duties in so far as he has rights" (109). For Hegel, "the state is the actuality of the ethical Idea" (155), and even more significant, the individual's "supreme duty is to be a member of the state" (156). The state obviously occupies an important place in Hegel's theory, and his versions of the state, civil society, and the state of nature differ significantly from that of his predecessors. In short, according to Hegel, his predecessors completely misunderstand the state and thus do not maintain a sharp distinction between the state and civil society. For Hegel, "the state is not a contract at all. . .nor its fundamental essence the unconditional protection and guarantee of the life of property of members of the public as individuals" (71).

In another departure from his predecessors, Hegel does not rely on an extended discussion of the state of nature, either as historical reality or theoretical construct. However, Hegel does provide one account of self-consciousness as it relates to the master-slave relationship. According to Pierre Hassner, "the conflict between master and slave is prior to the state. It has the same place in Hegel's formulation that the state of nature, the opposite of the civil state, has in Hobbes" (735). Hegel describes the master-slave relationship as "the struggle for recognition" which replicates itself in civil society, and this conflict must be reconciled by the state (qtd. in Hassner 735). Hegel provides his famous account of lordship and bondage in *Phenomenology of Spirit* where he argues that

"self-consciousness exists. . .only in being acknowledged" (111). At some point, some people (the lords) come to dominant others (the slaves), and this situation creates problems for those on both sides. From the lord's perspective, recognition from a slave is not enough, and from the bondsman's perspective, recognition does not occur at all because he is himself a thing: "But for what recognition proper, the moment is lacking, that what the lord does to the other he also does to himself, and what the bondsman does to himself he should also do to the other. The outcome is a recognition that is one-sided and unequal" (116).

The master-slave relationship then plays out in the division between civil society and the state because the state must provide the means for mutual recognition denied in the master-slave relationship (Hassner 736). Civil society replicates the conflict between master and slave. Hegel describes civil society as a realm of competing claims in which self-interested individuals fight a Hobbesian war to fulfill their individual needs. In this realm, particularity and universality exist in a precarious balance:

> particularity by itself, given free rein in every direction to satisfy its needs, accidental caprices, and subjective desires, destroys itself and its substantive concept in this process of gratification. At the same time, the satisfaction of need, necessary and accidental alike, is accidental because it breeds new desires without end, is in thoroughgoing dependence on caprice and external accident, and is held in check by the power of universality. In these contrasts and their complexity, civil society affords a spectacle of extravagance and want as well as of the physical and ethical degeneration of them both. (123)

Only the state can resolve these conflicts: "In the state, as something ethical, as the inter-penetration of the substantive and the particular, my obligation to what is substantive is at the same time the embodiment of my particular freedom. This means that in the state duty and right are united in one and the same relation" (161). Hegel thus maintains a sharp distinction between civil society and the state; contracts are part and parcel of civil society, not the state. Given that right and duty are unified in the state, Hegel does not provide a contractual justification of the state. Indeed, Hegel criticizes Rousseau, in particular, for "reduc[ing] the union of individuals in the state to a contract and therefore to something based on their arbitrary wills, their opinion, and their capriciously given express consent" (157). Instead, the state "is the ethical mind qua the substantial will manifest and revealed to itself, knowing and thinking itself, accomplishing what it knows and in so far as it knows it" (155).

Thus, Hegel attempts, however abstractly, to particularize Kant's version of duty and to call attention to obligations to others that tend to be overlooked by Hobbes and Locke. His version of the state provides the context within which an ethical life can be lived. Adrian Oldfield describes Hegel's version of the ethical life as "one in which the individual is not alienated or estranged from the society in which he lives" or "divided within himself between the various elements of his personality or character" (110). In the state, individuals can achieve self-realization as members of a true community, and individual self-interest no longer conflicts with public interest.

Karl Marx, however, believes that Hegel makes a mistake when he relies on the state to transform civil society into a true community. Indeed, Hegel's theory envisions a state that, for Marx, simply does not and cannot exist so long as civil society and the state

remain divided. Marx offers a compelling critique of the split between the individual and the community in his early piece "On the Jewish Question." Here, Marx, responding to his mentor Bruno Bauer, addresses the concept of rights within the context of Jewish emancipation. According to Bauer, the state should separate itself from religion in order to eliminate discrimination against Jews since the Jews will most likely always experience discrimination in a Christian state. However, Marx takes this claim a step further and argues that secularization alone is not enough so long as distinctions between the state and civil society persist. Marx, addressing the relationship between the political state and civil society, pays particular attention to "the secular division between the political state and civil society" (45). According to Marx, man lives a divided life because "the perfected political state is by its nature the species life of man in opposition to his material life" (46). In the political state, man is "valued as a communal being"; however, in civil society, "he is active as a private individual, treats other men as means, degrades himself to a means, and becomes the plaything of alien power" (46). Marx further clarifies his position by arguing that

> man in the reality that is nearest him, civil society, is a profane being. Here where he counts for himself and others as a real individual, he is an illusory phenomenon. In the state, on the other hand, where man counts as a species being, he is an imaginary participant in an imaginary sovereignty, he is robbed of his real life and filled with an unreal universality. (46)

Thus, Marx calls our attention to the ideological nature of this division.

The classical liberal commitment to liberty, rights, and freedom is exposed as ideological when Marx distinguishes between the rights of man and the rights of the citizen. The man of civil society, "egoistic man, man separated from other men and the community" (52), appears as "natural man" protected by natural rights (56). Marx quotes several provisions from the Declaration of the Rights of Man and various state constitutions, and concludes that "freedom is the right to do and perform what does not harm others. The limits within which each person can move without harming others is defined by the law, just as the boundary between two fields is defined by the fence" (53). Thus the right of man depends not on "union" but on "separation" (53).

Marx links this problem to the Lockean conception of private property and property rights and argues that "the practical application of the rights of man to freedom is the right of man to private property" (53). Men can enjoy their property "without regard for other men, independently of society" (53). Instead of creating connections between men, property ownership erects barriers and "leads man to see in other men not the realization but the limitation of his own freedom" (53). Civil society, then, exists to guarantee its members "the preservation of his person, rights, and property" (53), and the rights of man never move beyond this egoistic conception. The citizen becomes the "servant" of the egoistic man of civil society because "society appears as a framework exterior to individuals, a limitation of their own self-sufficiency" (54). This division creates and perpetuates a false view of human nature as self-interested, egoistic, and isolationist that in turn depends on substituting an illusory political state that supposedly secures freedom, rights, and liberty for all, equally, as the source of liberation. The

citizen exists to justify the rights of man in civil society, and the contract itself is a false one because it cannot overcome these divisions.

Not surprisingly, Marx views revolution as the only true means to remedy this problem because only massive change can transform material relationships. In a post-revolution utopian society, rights would be unnecessary because class conflict would no longer exist. Political emancipation alone is not enough because it entails "the reduction of man, on one hand to a member of civil society, an egoistic and independent individual, on the other hand to a citizen, a moral person" (57). True emancipation would bring "back man's world and his relationships to man himself" (57); thus "man must recognize his own forces as social forces, organize them, and thus no longer separate social forces from himself in the form of political forces" (57).

When the working class achieves power, rights will be irrelevant because its "particular interests coincide with the universal" (Kain 77). As Kain explains, "rights for Marx are expressions of class interests" (77). Since rights are held against other individuals, rights amount to a barrier between the individual and the community, and operate as ideology to obscure man's true nature and his right relationship to the world. Jeffery Reiman explains that "ideology infects morality by the way in which our moral beliefs are shaped by the very system that they are meant to judge" (161). Ideology, then, makes the unjust appear just, and ideological critique exposes such delusions.

Marx's critique can be extended to the entire tradition of social contract theory reviewed thus far. His relentless attention to material conditions reveals practical limitations on the hypothetical freedom promised by the social contract theory. Thus, Locke, Rousseau, Kant, and Hegel all describe freedom that, for all practical purposes,

remains an illusion based on an idealized situation rather than the real world. Similarly, the social contract, as well as legal contracts, commodify and objectify the very self they attempt to free. For Marx, these tensions between theory and practice cannot be overcome, and social contract theory must be rejected because it does not adequately provide for public interests.

Marx is not the only theorist to reject social contract theory based on its emphasis on the individual self interest at the expense of public interests. Often characterized as a family squabble, the debate between social contract theorists and utilitarians also centers on the extent, if any, that individual autonomy should be emphasized in relation to broader social goals. In "Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution," Jeremy Bentham attacks the notion of a social contract and its typical guarantee of natural rights to life, liberty, and property for all men equally. Bentham provides a point-by-point critique of the famous Declaration of the Rights of Man and the Citizen (1791) and claims that "the logic of it is of a piece with its morality:--a perpetual vein of nonsense, flowing from a perpetual abuse of words" (48).[7] He tells his audience the following: "Look to the letter, you find nonsense—look beyond the letter, you find nothing" (49). Bentham seems most troubled by appeals to natural rights, here to "liberty, property, security, and resistance to oppression" (Article II), to justify the political obligation of citizens in exchange for the protection of those rights by the state. For Bentham, there is "no such thing as rights anterior to the

[7] Interestingly, Bentham's critique centers on a literal interpretation of the Declaration's language. He explains that "In a play or novel, an improper word is but a word: and the impropriety, whether noticed or not, is attended with no consequences. In a body of laws—especially of laws given as constitutional and fundamental ones—an improper word may be a national calamity: and civil war may be the consequence of it. Out of one foolish word may start a thousand daggers" (49).

establishment of government" (52). As a result, the notion of natural rights "is simple nonsense. . .[,] nonsense upon stilts" (53). The only legitimate rights arise from legislatively enacted law because

> *right*, the substantive right, is the child of law: from real laws come real rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights, a bastard brood of monsters. (69, emphasis in the original)[8]

Only positive law creates rights and duties, and this law provides no sanctions to enforce the broader moral claims associated with natural rights.

Bentham attacks the social contract tradition at its very roots when he claims that "contracts come from government, not government from contracts" (55). Thus, the "origination of governments from a contract is pure fiction" (55). Instead, governments are generally "established by habit, after having been formed by force" or "formed by individuals who have been emancipated" (55). Regardless of how a government comes into existence, Bentham believes that its primary aim should be to maximize social utility which provides an alternative justification for a contract; he criticizes Locke's version of the social contract for "teaching men to look for the proper end of government, not in the conduciveness of its forms and arrangements to the greatest happiness of the community, but to the observance of a fiction" that is ultimately an inadequate substitute for the

---

[8] Dworkin points out that Bentham's view of rights never became a prominent strand of "orthodox political theory" (184).

greatest happiness principle (*Article on Utilitarianism Long Version* 298).[9] Bentham's famous moral calculus indicates that human action, both on the individual and the social levels, should maximize "the greatest happiness" in order to meet the goals of utility (309), and he defines utility as "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of party whose interest is in question" (*Principles of Morals* 11-12). Bentham believes that this principle should guide every action: "I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government" (12). At the social level, utility also helps define community happiness because community happiness is "the sum of the interests of the several members who compose it" (12). Most importantly, an action conforms to utility "when the tendency it has to augment the happiness of the community is greater than any which it has to diminish it" (12). Bentham then provides a different basis for contract; contractual obligation should be measured according to its social utility. Thus, as a consequentialist theory, utilitarianism requires that both individual and community decisions must be justified in terms of the greater good.

The maximization of utility as the final greatest good is often viewed as in opposition to the emphasis placed on the individual, in albeit different ways, by Locke and Kant. Respect for rights seems to allow room for distinctions, and thus individual choices, among various theories of the good, none of which will be outwardly supported

[9] Stumpf points out that for Bentham, "the obligation to obey, even in social contract theory itself, rests on the principle of utility, for it really says that the greatest happiness of the greatest number can be achieved only if we obey the law" (358).

by the state.[10] John Stuart Mill's work reflects the tension between the classical liberal emphasis on individual interests and the utilitarian emphasis on public interests and social goals. He attempts to address this problem with Bentham's theory by further clarifying what utility itself means. Rather than a pure quantitative assessment of pleasure and pain, Mill's approach adds a qualitative dimension that distinguishes between higher and lower pleasures. Though he ultimately endorses a consequentalist theory not that different from Bentham's, Mill also attempts to address concerns about the role of the individual within the utilitarian analysis. In *On Liberty,* what many view as the most significant defense of individualism, Mill argues that

> the only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, or right, absolute. Over himself, over his own body and mind, the individual is sovereign. (13)

Thus, for Mill individual concerns should become part of the utilitarian calculus. However, this does have some limits because "even what a person has produced by his individual toil, unaided by anyone, he cannot keep, unless by permission of society" (*Principles of a Political Economy* 200). Therefore, distribution of wealth "depends on the laws and customs of society," and we should consider "not the causes, but the consequences, of the rules according to which wealth may be distributed" (200).

---

[10] In *Theory of Justice*, Rawls claims that "Utilitarianism does not take seriously the distinction between persons" (24). Rawls distinguishes his theory by suggesting that in his view of justice, "each member of society is thought to have an inviolability founded on justice, or as some say, natural right, which even the welfare of every one else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others" (24-25).

As Mill's work indicates, the utilitarian critique of rights maintains some commitment to individual interests values at the same time that it suggests a move away from self-interest as a primary motive for individual action if individual utility is actually subsumed into group utility.

As this brief review of the philosophical origins of social contract theory suggests, social contract theorists struggle to reconcile the tension between the individual and the community by positing a contract through which the individual agrees to concede some autonomy to the state. For these theorists, the social contract plays a key role in determining both what society is and what it ought to be and in defining what it means to be free. However, Marx, in particular, directs attention to the material conditions of capitalism that render such formal freedom an illusion and argues that these conditions produce a version of human subjectivity that fails to recognize connections with others. Similarly, utilitarians and Marxists alike point out that social contract theory emphasizes the individual interests at the expense of public interests. More specifically, Marx and Hegel imply that contract provides a deceptive resolution since the tension between the individual and the community is itself an illusion because the individual can achieve self-realization only in and through the community or, in Hegel's case, living an ethical life in the state. For Marx and Hegel, the state, then, no longer arbitrates disputes because disputes simply do not occur, and justice becomes unnecessary. In light of these objections, what, if anything, does social contract theory have to offer, either as a justification for political obligation, as a justification for ethical commitments to others, or as a background justification for legal obligation?

20th Century Revival of Contract Theory

"My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract found, say, in Locke, Rousseau, and Kant." John Rawls, *A Theory of Justice*

Since a Marxist utopia, a Hegelian ethical state, or another model rendering justice irrelevant has not been realized, the issue of justice continues to occupy many contemporary philosophers who do find social contract theory a useful tool through which to think about justice. In *A Theory of Justice* (1971), John Rawls virtually single-handedly revives the social contract as a means to define justice and sets the agenda for a significant direction of intellectual thought in the next quarter century.[11] Like his predecessors, Rawls suggests that the need for justice arises when individuals assert competing claims, and justice then becomes the standard to reconcile those claims. However, justice can go much further than merely arbitrating disputes between right holders, and Rawls explores how we can construct a society that will manifest justice. Rawls recognizes the fundamental gap between the hypothetical freedom the social contract promises and the actual material conditions within which that promise must be fulfilled. He addresses this tension within contract theory by providing principles of justice designed to facilitate distributive justice and thus mitigate, if not eliminate, the economic and social inequality that so concerned Marx. Similarly, to justify his principles, Rawls imagines the original position, rather than the state of nature, as a starting point in which individuals are stripped of their socially acquired characteristics

[11] In the following discussion of Rawls, I draw on both the 1999 revised edition of *A Theory of Justice* and *Justice as Fairness: A Restatement* (2001). Generally speaking, I use *A Theory of Justice* when it provides the fullest and most recent statement of the complete theory and turn to *Justice as Fairness: A Restatement* (2001) for significant revisions of his theory.

and can thus disinterestedly deliberate about the principles of justice. Once arrived at, the principles are not permanently fixed. Should circumstances change, the principles can be revised through the process of reflective equilibrium. Thus, Rawls attempts to provide a way to negotiate many of the tensions within social contract theory while avoiding, or at least mitigating, its most significant limitations.

First, Rawls attempts to bring hypothetical freedom a few steps closer to reality by recognizing that material conditions undermine the potential for self-fulfillment. In *Justice as Fairness: A Restatement,* Rawls points out that, in order to attain the freedom and autonomy Locke envisions, "we need an account not only of the just initial state [the state of nature] and of fair agreements, but also of just social conditions under which fair agreements are to be reached" (53). For Rawls, Locke's theory does not provide a sufficient means "to ensure that fair background conditions are maintained" (53). In order to address this limitation in Lockean theory, Rawls argues that the subject of justice must be the "basic structure of society" (39).[12] The basic structure includes "the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way in which they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time" (10). In *A Theory of Justice* Rawls provides an even more specific definition of social institutions that are the subject of justice: "the legal protection of freedom of thought and liberty of

---

[12] Like Hobbes and Locke, Rawls assumes that men act out of self-interest and that rational, self-interested individuals want certain things. In *A Theory of Justice,* Rawls argues that the basic structure of society distributes primary social goods that all rational men are presumed to want. The main primary goods are "rights, liberties, and opportunities, and income and wealth" (54). He later includes self-respect (386). Rawls distinguishes social goods from natural goods. Though the structure of society can also influence

conscience, competitive markets, private property in the means of production, and the monogamous family are examples of social institutions" (6). These institutions are properly the subject of justice because they "define men's rights and duties and influence their life prospects" (6). Thus, social justice "depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society" (7).[13] He goes far beyond the idea that justice refers primarily to issues related to government, law, and legal systems, and instead attends to the inequalities he believes inherent in the structure of society. Rawls recognizes that "the effects of the basic structure on citizens' aims, aspirations, and character, as well as on their opportunities and their ability to take advantage of them, are pervasive and present from the beginning of life" (*Restatement* 10).

In an effort to address these factors, Rawls describes two principles of justice. In *A Theory of Justice,* Rawls suggests that his principles reflect a "more general conception of justice" suggesting that "all social values—liberty and opportunity, income and wealth, and the social bases of self respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage" (54). Any inequalities must make everyone, even those who are least advantaged, better off. The two principles will apply to "the basic structure of society and govern the assignment of rights and duties and regulate the distribution of social and economic advantages" (53). The basic structure, then, determines our ability to obtain these advantages. The social

---

the distribution of natural goods such as "health and vigor, intelligence and imagination," the "possession" of natural goods is not as directly under the control of the social structure (54).

[13] Rawls later explains that "whether men are free is determined by the rights and duties established by the major institutions of society" (*Theory of Justice* 55).

system can be considered in two parts; the first principle addresses the way that the basic structure "specifies and secures citizens' equal basic liberties. . .and establishes a just constitutional regime," while the second principle addresses "the background institutions of social and economic justice in the form most appropriate to citizens seen as free and equal" (*Restatement* 48). Taken together, these principles will help us make judgments about the justice of institutions. The principles are lexically ordered so that the first principle has priority over the second principle (*Restatement* 43).[14]

The first principle stipulates that "each person has the same indefeasible claim to a fully adequate scheme of basic liberties, which scheme is compatible with the same scheme of liberties for all" (*Restatement* 42). First principle liberties can be limited only when they interfere with other first principle liberties (*Restatement* 43). In *A Theory of Justice*, Rawls argues that the first principle protects several liberties, such as political liberty, freedom of the person, freedom of thought, freedom from unfair arrest, and the right to hold personal property, also privileged by classical liberals such as Locke (53).[15]

---

[14] For instance, men typically cannot give up first principle liberties in exchange for economic or social advantages (*Restatement* 43).

[15] In *A Theory of Justice,* Rawls' basic list of these liberties includes "political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law" (53). Rawls also recognizes the difficulty in defining basic liberties apart from particular social, economic, and technological circumstances of a society (54). The source of these liberties is also rather ambiguous, and Rawls provides a more complete account of their origins in the *Tanner Lectures on Human Value* (1982). In "The Basic Liberties and their Priority," Rawls explains that the basic list could be developed in two ways. First, we could take an historical approach by studying the "constitutions of democratic states and put together a list of liberties normally protected" (6). Second, we might "consider which liberties are essential social conditions for the adequate development and full exercise of the two powers of moral personality over a complete life" (7). For further discussion of this issue, see James W. Nickel, "Rethinking Rawls' Theory of Liberty and Rights," and Rex Martin, *Rawls and Rights* (1985).

However, Rawls, unlike most classical liberals, does rethink traditional notions of property rights; thus, in *Justice as Fairness: A Restatement*, Rawls points out that "the right to private property in natural resources and means of production generally, including rights of acquisition and bequest" as well as "the right to property as including the equal right to participate in the control of the means of production and of natural resources," are not basic rights (114). He does, however, argue that "the right to hold and to have the exclusive use of personal property" is "among the basic rights" (114). Here, Rawls wants to avoid inserting a particular conception of property at the level of basic rights.

The second principle focuses on the distribution of primary goods such as income, wealth, and opportunity; this principle indicates that "social and economic inequalities are to satisfy two conditions: first they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)" (*Restatement* 42-3). The first part is commonly referred to as "fair equality of opportunity" while the second part is often called "the difference principle." Fair equality of opportunity demands more than formal equality; indeed, everyone "should have a fair chance" to attain the "public offices and social positions" at issue (*Restatement* 43). The difference principle suggests that social and economic inequalities should be arranged in a way that benefits the least advantaged representative man. In *A Theory of Justice,* Rawls explains that the least advantaged position considers three types of contingencies:

> the group includes persons whose family and class origins are more disadvantaged than others, whose natural endowments (as realized) permit

> them to fare less well, and whose fortune and luck in the course of life turn out to be less happy, all within the normal range. . .and with the relevant measures based on social primary goods. (83)

Rawls then believes that his principles would "mitigate the influence of social contingencies and natural fortune on distributive shares" (63).

These contingencies are also at issue when Rawls describes the contractual situation that gives rise to the principles of justice. The parties adopt these principles from a position of equality so that the principles are presumed fair because the situation itself reflects the conditions of justice. In *A Theory of Justice,* Rawls explains that

> the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness. (10)

In the social contract theory of Locke and Hobbes, the parties choose to enter the contract to mitigate the risks inherent in an unstable state of nature. However, Rawls, like Kant, posits a logical construct rather than a narrative about the state of nature.[16] Rawls refers

---

[16] Here, Rawls avoids the criticism heaped on Locke and Hobbes for various problems associated with the state of nature. Hume's critique is an important example of this type of criticism. However, other critics continue to find problems with Rawls' construct. Sandel points out that "not only did his contract never really happen; it is imagined to take place among the sorts of beings who never really existed, that is, beings struck with the kind of complicated amnesia necessary to the veil of ignorance" (105). Dworkin

to this construct as the original position in which all parties lose individual characteristics behind the veil of ignorance. As Rawls explains in *Justice as Fairness,*

> In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and ethnic group, sex or various native endowments such as strength and intelligence, all within the normal range. We express these limits on information figuratively by saying that the parties are behind a veil of ignorance. (15)

Because they are behind the veil of ignorance in the original position, individuals do not know anything about themselves, their individual desires, or what their particular situations will be once the veil is lifted. Thus, parties cannot choose principles of justice to benefit themselves as individuals or to advance their particular theories of the good because they do not know what type of structure would most benefit their position in society. Given this theoretical construct, parties should develop the best principles of justice without regard to who they turn out to be, and the contract then originates from a situation of fairness between all parties, and no one benefits from morally arbitrary traits.[17] Also, since the parties lack particular information about their own desires, the principles adopted are presumed to be universalizable.

---

also believes that "a hypothetical contract is not a contract at all" (*Taking Rights Seriously* 151). For Dworkin, the fact that parties agree to a contract does not self-justify what they actually agreed to do.

[17] Rawls does assume that the parties behind the veil are rational individuals who will want to maximize their own opportunities once the veil is lifted and that they will opt for the best worst-case scenario in the event that they are members of the least advantaged group; this assumption is often referred to as the maximin rule (*A Theory of Justice* 133). The maximin rule suggests we should "adopt the alternative the worst outcome of which is superior to the worst outcomes of others" (133). Notably, Rawls believes that the worst outcome under utilitarianism would be worse than the worst outcome under his theory.

For Rawls, the original position represents a "procedural interpretation of Kant's conception of autonomy and the categorical imperative within the framework of empirical theory" (*A Theory of Justice* 226). Here Rawls revamps Kant in an effort to eliminate some of Kant's transcendental laws that prove problematic for current theories; the original position provides some particularity for Kant's idea of autonomy so that his conception of the categorical imperative is no longer "purely transcendent" (226). In order to accomplish this, Rawls makes several assumptions about the parties to his contract, and his ideas about the person form an important part of his theory; significantly, "a moral person is a subject with ends he has chosen" (491). This fundamentally Kantian view of the self provides an important part of Rawls' justification for his theory.[18] Indeed, in the opening chapter of *A Theory of Justice*, Rawls claims that "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override" (3). In this sense, "in justice as fairness the concept of right is prior to that of the good" (28).[19] In the original position, the parties want "to establish just and favorable conditions for each to fashion his own unity" (493). Here, Rawls emphasizes the ability of the parties to choose, as rational, autonomous agents, the principles of justice; Rawls explains that "the theory of justice is a part, perhaps the most

---

[18]Rawls also suggests that "philosophical reflection" could persuade us to accept his principles (19). Here, Rawls turns to Kant and makes several assumptions about the parties to his contract. Though they lack any specific information about themselves, they do possess certain characteristics. Rawls believes that the parties act rationally and autonomously, as noumenal selves, when they adopt these principles from behind the veil of ignorance.

[19] Rawls acknowledges that this requirement imposes some criteria on justice as fairness. Significantly, "certain initial bounds are placed upon what is good and what forms of character are morally worthy, and so upon what kinds of persons men should be" (28).

significant part, of the theory of rational choice" (15). Following Kant, Rawls explains that

> a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and equal rational being. The principles he acts upon are not adopted because of his social position or natural endowments, or in view of the particular kind of society in which he lives or the particular things that he happens to want. To act on such principles is to act heteronomously. (222)

Rawls believes that the constraints of the original position prevent heteronomous acts because the parties do not have the knowledge of themselves that would cause them to choose principles based on social position or other natural endowments.

The original position, or the conditions for choosing the principles, must produce principles that are also consistent with the parties' considered judgments. Rawls defines considered judgments as

> those given when conditions are favorable to the exercise of our powers of reason and sense of justice: that is, under the conditions where we seem to have the ability, the opportunity, and the desire to make a sound judgment; or at least we have no apparent interest in not doing so, the more familiar temptations being absent. (*Restatement* 29)

Some of these intuitive judgments provide "fixed points," such as the claim that slavery is wrong, from which to work (29). Whenever discrepancies exist between considered judgments and the principles of justice, the parties can rethink their judgments to

eliminate "certain irregularities and distortions" (*A Theory of Justice* 42).[20] This process of revision eventually leads to "reflective equilibrium," a moment of order but not necessarily stability. In *A Theory of Justice,* Rawls provides a detailed account of this process:

> By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. (18)

This state achieves equilibrium because "principles and judgments coincide," and "is reflective since we know to what principles our judgments conform and the premises of their derivation" (18). This equilibrium is not stable or permanent because additional analysis of the "contractual situation" and "particular cases" could compel the parties to revise their judgments (18). Thus, the original position "represents the attempt to accommodate within one scheme both reasonable philosophical conditions on principles

[20] The extent that such irregularities and distortions can be fully addressed remains unclear. As Sunstein points out, "an outsider could believe, with good reason, that someone who has reached reflective equilibrium is nonetheless wrong, since some of the provisional fixed points that generated his equilibrium are rooted in prejudice or confusion. Someone from America or England, for example, might reject the ethical views of someone from Iraq, even if those views are part of an overall position that embodies reflective equilibrium" (17). In an early article, "Outline of a Decision Procedure for Ethics," that explores what would become the original position and the veil of ignorance, Rawls describes the characteristics of competent judges and explains that an ideological decision "violates the. . .criteria" (181). According to Rawls, "ideologies, of whatever type, claim a monopoly of the knowledge of truth and justice for some particular race, or social class, or institutional group, and competence is defined in terms of racial and/or sociological characteristics which have no known connection with coming to know" (181).

as well as our considered judgments of justice" (19).[21] Both the principle and the practice, then, come into some sort of balance so that neither the general nor the particular is privileged. Reflective equilibrium provides provisional balance in those moments when our judgments "differ from those of other persons" or "conflict with one another" (*Restatement* 30).

Critical Theory and Justice

"To Breed an animal with the right to make promises—is this not the paradoxical task that nature has set itself in the case of man?"

Friedrich Nietszche, *On the Genealogy of Morals*

Though Rawls' work continues to produce commentary in what amounts to a Rawls cottage industry in law reviews and philosophy journals, only a few poststructuralist and postmodernist thinkers, particularly theorists such as Michel Foucault, Jean-Francois Lyotard, and Jacques Derrida and their disciples, directly engage his work. Indeed, Jurgen Habermas is one of the very few influential critical theorists who responds directly to Rawls' ideas about justice. This lack of dialogue stems, at least in part, from the drastically different focus of their respective projects since Rawls and Habermas retain some connection to liberalism and/or humanism. Given the influence of

---

[21] In *A Theory of Justice,* Rawls explains further:

> One way to look at the idea of the original position, therefore, is to see it as an expository device which sums up the meaning of these conditions and helps us to extract their consequences. On the other hand, this conception is also an intuitive notion that suggests its own elaboration, so that led on by it we are drawn to define more clearly the standpoint from which we can best interpret moral relationships. We need a conception that enables us to envision our objective from afar: the intuitive notion of the original position is to do this for us. (19)

Foucault, Derrida, and Lyotard among literary theorists, it is not surprising that a recent search of the MLA database turned up only a few entries on Rawls.

Despite this lack of dialogue, poststructuralist and postmodernist theorists offer significant critiques of the contractual model of justice proposed by Rawls. Thus, it is important to understand a few basic themes in poststructuralist and postmodernist theory, even though mapping major themes goes against the postmodern resistance to modern narratives that seem to provide epistemological foundations and thus false closure. Poststructuralist theory, particularly Foucault's version, draws many of its basic presuppositions from the work of Friedrich Nietzsche who provides a compelling critique of Enlightenment reason as well as the social structures and model of human agency it produces.

Nietzsche targets Kant and Hegel in particular for their reliance on reason to justify what seem to be universal truths (i.e., the categorical imperative) but are instead reflections of their own biases; indeed, Nietzsche argues that

> it is high time to replace the Kantian question, 'How are synthetic judgments *a priori* possible?' by another question, 'Why is belief in such judgments *necessary*?'—and to comprehend that such judgments must be *believed* to be true, for the sake of the preservation of creatures like ourselves; though they might, of course, be false judgments for all that. (*Beyond Good and Evil* 209, emphasis in original)

Given his critique of reason, Nietzsche then rejects many of the institutions and social structures associated with the Enlightenment because Enlightenment rationality creates an imbalance by emphasizing Apollonian order at the expense of Dionysian celebration

and intoxication. As Nietzsche explains in *The Birth of Tragedy,* Apollo—"that measured restraint, that freedom from the wilder emotions, that calm of the sculptor god" (35)—frustrates true self-realization by suppressing Dionysus—representative of "the blissful ecstasy that wells from the innermost depths of man" (36). With the recognition of the Dionysian comes a "primordial unity" in which "each one feels himself not only united, reconciled, and fused with his neighbor, but as one with him" (37). In the Dionysian, "the slave is a free man," and "all the rigid, hostile barriers that necessity, caprice, or 'impudent convention' have fixed between man and man are broken" (37). However, not everyone can achieve the necessary balance between the Apollonian and Dionysian realms. Indeed, as Nietzsche puts it, "independence is for the very few; it is a privilege of the strong" (*Beyond Good and Evil* 231). Nietzsche reserves an important role for the artist or new philosopher who, through the will to power, is capable of creating new values. For Nietzsche, "a living thing seeks above all to discharge its strength—life itself is a will to power" (*Beyond Good and Evil* 211).

The social contract, in particular, comes under suspicion because Nietzsche doubts that the individual exists prior to civil society and thus consents to a contract that creates and justifies the state. Similarly, the individual can never be sufficiently free of social constraints to enter a contract as an autonomous agent. For Nietzsche, the autonomous agent is but an illusion in which only the weak need believe: "this type of man needs to believe in a neutral independent 'subject,' prompted by an instinct for self-preservation and self-affirmation in which every lie is sanctified" (*Geneology of Morals* 482). Similarly, this subject embraces "the sublime self-deception that interprets weakness as freedom" (482). The idea, then, that the state originates through a founding

contract is "sentimentalism" because, as Nietzsche explains it, "He who can command, he who is by nature 'master,' he who is violent in act and bearing—what has he to do with contracts!" (522). Only the artist can break free from this double-bind by rejecting the values of the past to rewrite those for the future.

Derrida, Foucault, and Lyotard share Nietzsche's suspicion of meta-narratives that attempt to provide a foundation for knowledge; such foundational narratives certainly include the social contract, natural law/rights, legal contract/rights, and even justice itself. Invoking a universal meta-narrative of justice means unjustly silencing other narratives; difference must be acknowledged. According to these theorists, the language of justice can no longer claim universal validity, and in the absence of adequate criteria to support judgments, it becomes difficult, if not impossible, to determine what is just for individuals as well as society. The meaning, the content, of justice remains forever deferred, in process, and the subject of justice is fragmented.

Both classical liberalism and more recent conceptions of political liberalism generally presuppose some sense of agency, grounded in a unified, coherent sense of self, that allows individuals to choose their own ends. Though Marxists certainly criticize the individual subject as an ideological construct, Marxism nevertheless assumes a universal subject to be emancipated. Foucault, following Nietzsche, rejects the possibility of any project, especially a liberal project conceived of in terms of law or legal guarantees, for the emancipation of a foundational or universal subject. His understanding of power and power relationships radically alters traditional conceptions of the self and by implication conceptions of the political subject. In *History of Sexuality*, Foucault writes, "in western societies since the Middle Ages, the exercise of power has always been formulated in

terms of law" (87). Foucault suggests that "the system of right, the domain of the law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation" (*Power/Knowledge* 96). Thus, "there are manifold relations of power which permeate, characterize, and constitute the social body" (93). The meta-narrative of social contract theory promises freedom through consent while allowing the legitimation of state control, and one important point of power is the contract itself. As Foucault explains, "the contract may have been regarded as the ideal foundation of law and political power; panopticism constituted the technique, universally widespread, of coercion" (*Discipline and Punish* 222).

Determining who or what gets coerced becomes extremely difficult, and the rights apparently secured for subjects through contract are part of this problem because rights only seem to establish boundaries and limit the state's power:

> The theory of sovereignty, and the organization of a legal code centered upon it, have allowed a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee everyone, by virtue of sovereignty of the State, the exercise of his proper sovereign rights. (*Power/Knowledge* 105)

Claiming rights, then, replicates rather than resists power. Foucault points out that both the "codification" and "theorisation" of juridical systems "have enabled sovereignty to be democratised through the constitution of a public right articulated upon collective sovereignty, while at the same time this sovereignty was fundamentally determined by

and grounded in mechanisms of coercion" (105). The disciplines, then, allow the subject to be governed without a sovereign.

Even more important, for Foucault as for Nietzsche, the subject of power is not a subject in the traditional sense of an autonomous agent who makes conscious choices regarding his or her own ends. Instead, the subject is contingent, a mere product of the various power relationships that constitute it. As Foucault puts it, "the man described for us, whom we are invited to free, is already in himself the effect of a subjection much more profound than himself" (*Discipline and Punish* 30). Thus, liberation of the self no longer seems a viable goal because the foundational essence of man, essential to liberal theories and Marxism, just does not exist. Man, at his core, is always already the subject of power.

Like Foucault, Jacques Derrida also questions foundational assumptions, particularly those assumptions that seem to structure language and thus our understanding of various basic concepts. Since the earlier philosophical debate about social contract, rights, and justice depends on binary oppositions such as individual/community, self/other, and subject/object, Derrida's deconstruction offers one way to question the binary structure of meaning that grounds the terms of the debate. For Derrida, the typical philosophical structuring of this debate in binary terms is problematic on its face because such oppositions tend to fix meaning by privileging one term over the other term. In Derrida's classic example, western philosophy presents a metaphysics of presence as a necessary epistemological foundation. Similarly, the binary opposition of subject and object can no longer articulate a valid distinction because the subject's description of the

object is always already in motion, at play, thus resulting in the endless deferral of meaning. Unmediated knowledge of the world remains unattainable.

These claims have far-reaching implications for the concept of justice. In "Force of Law: The Metaphysical Foundation of Authority," Derrida rejects what he sees as the utopian version of justice innate in Marxism and responds to critics who think that "deconstruction doesn't in itself permit any just action" (923). Though Derrida claims at one point that "deconstruction is justice" (945), the argument that emerges demonstrates the impossibility of justice because "one cannot speak directly about justice, thematize or objectivize justice, say 'this is just' even less 'I am just,' without immediately betraying justice" (935). Judgments or justifications of actions as just or unjust are impossible "since I cannot speak the language of the other except to the extent that I appropriate and assimilate it" (949). In contrast to most social contract theorists, Derrida claims that justice is "irreducible because it is owed to the other, owed to the other before any contract," "irreducible in its affirmative character, in its demand of gift without exchange without economic circularity, without calculation and without rules" (965). A contract becomes impossible, and ultimately unnecessary, because any exchange with the other must be a gift. As a result, we "recognize" in justice "a kind of madness" (965).

Similarly, Lyotard also conceives of justice in impossible terms. Like Derrida's deconstruction, Lyotard's postmodernism resists foundational claims for authority, particularly claims based on a modern notion of progress so that the social system can no longer be "conceived as a totality" (*Postmodern Condition* 63). Lyotard writes, "we no longer have recourse to the grand narratives—we can resort neither to the dialectic of Spirit nor even to the emancipation of humanity as a validation for postmodern scientific

discourse" (60).[22] Justice becomes suspect because it depends on the establishment of universally valid criteria, criteria that must be translated among vastly different local communities and individuals. Since translation is impossible among these communities, justice is, for Lyotard, incommensurable. Thus, he advocates " a politics that would respect both the desire for justice and a desire for the unknown" (67).

In *The Differend*, Lyotard describes incommensurability in terms of the relationship between language, particularly language games, and justice. Lyotard defines the differend as "the unstable instant of language wherein something which must be put into phrases cannot yet be" (13). The differend suggests a kind of language game, and since language games function separately, each with its own rules and no common standards among various games, the differend presents justice as impossible. In a problematic move, Lyotard explains that "it is in the nature of a victim not to be able to prove that one has been done a wrong. A plaintiff is someone who has incurred damages and who disposes of the means to prove it. One becomes a victim if one loses these means" (8). A case of a differend occurs when "the plaintiff is divested of the means to argue and becomes for that reason a victim"; thus, the parties' dispute is settled "in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom" (9). When the plaintiff cannot prove a wrong in the language of the court, the plaintiff becomes a victim because the criteria for justice does not recognize the situation of the victim, who is somehow different (or as Derrida would put it, the Other). The language of justice, then, cannot represent the victim.

---

[22] Madan Sarup describes *The Postmodern Condition* as "a thinly veiled polemic against Jurgen Habermas," particularly Habermas' notion of communicative reason as a way to reconcile various discourses (153).

While the postmodern and poststructuralist emphasis on language as both constructing and constructed by the social world provides another means to analyze the use of legal language in literary texts, the critique of any and all foundations creates another problem. If we can no longer accept a universal idea of justice, then what are we to do without it? Jurgen Habermas contests the separation of justice from political action and moral and ethical concerns. According to Michael Pusey, Habermas challenges both the British empirical tradition and its "irrational individualism" as well as Marxists who remain "stranded in a hopelessly discouraging apocalyptic nihilism" because neither approach appreciates what Habermas refers to as "the suppressed traces of reason" (15). Practical reason operates in three distinct areas and "undergo[es] alteration" in each area (*Justification and Application* 10). Thus,

> practical reason, according to whether it takes its orientation from the purposive, the good, or the just, directs itself in turn to the choice of the purposively acting subject, to the resoluteness of the authentic, self-realizing subject, or to the free will of the subject capable of moral judgement. (10)

Each orientation of reason is prominent in one of the three major philosophical traditions. Practical reason is used pragmatically in the empiricist tradition and is "reduced to the purposive exercise of the understanding" within the realm of empirical reality (10). In contrast, Aristotle "views practical reason as limited essentially to ethical self-understanding and consequently to the sphere of the good" (21) so that "practical reason assumes the role of a faculty of judgement" for the individual subject (10). The third

view, associated with Kant, calls our attention to the just on the universal level concerned with articulating norms and principles, and practical reason "becomes coextensive with morality in its role as a norm-testing court of appeal" (13); thus, it guides moral decisions because "only in autonomy do reason. . .and the will attain unity" (10).

One of the problems with modernity is its reliance on purposive rationality, particularly in the form of instrumental reason associated with science, at the expense of other forms of reason. Rather than rejecting modernity as a failed project, Habermas believes that modernity is still under construction and that many of its problems can be adequately addressed through communicative reason/communicative rationality. Habermas describes his entire project as discourse ethics that "views the moral point of view as embodied in an intersubjective practice of argumentation which enjoins those involved to an idealizing *enlargement* of their interpretive perspective" ("Reconciliation" 117). McCarthy suggests that the goal of discourse ethics is "to reconstruct the moral point of view as the perspective in which competing normative claims can be fairly and impartially adjudicated" (*Critical Theory* 52). Regardless of the situation, a rational decision can be discovered through communicative reason and then enacted through communicative action. As a result, norms are justified through argument. Habermas explains when acting and speaking subjects agree, the agreement "is achieved simultaneously on three levels" and operates

> (a) to establish and renew interpersonal relations, whereby the speaker takes up a relation to something in the world of legitimate (social) orders; (b) to represent (or presuppose) states and events, whereby the speaker takes up a relation to something in the world of existing states of affairs;

> (c) to manifest experiences—that is to represent oneself—whereby the speaker takes up a relationship to something in the subjective world to which he has privileged access. (qtd. in Pusey 79-80)

The agreement should be evaluated based on these validity claims, and according to Pusey, communicative action "must be action that is oriented to reaching an understanding across all three dimensions" (80). These validity claims correspond to the three major philosophical arguments; thus (a) suggests the Kantian realm of regulative norms for validity, (b) refers to empirical truth for validity, and (c) turns to Aristotle's sense of ethos and sincerity of the subject for validity.[23]

Unlike Lyotard, who maintains that consensus is "an outmoded and suspect value" (*Postmodern Condition* 66), Habermas believes that language can clarify seemingly incommensurate claims and even lead to consensus when communicative reason manifests itself in free agreements among individuals.[24] Discourse ethics also seems to eliminate many of the problems associated with classical liberalism, as well as Rawls' version of political liberalism. McCarthy maintains that "practical discourse

---

[23] See Pusey 78-85 for a brief discussion of communicative action. He also provides a helpful chart that situates each type of communication according to the domain of reality and the ground for validity; this chart indirectly clarifies the relationship between validity claims and the three philosophical views of reason.

[24] In *The Postmodern Condition,* Lyotard discusses several of Habermas' assumptions. Lyotard does not believe that speakers can ever agree on rules, "metaprescriptions" that can be "universally valid," since "language games are heteromorphous, subject to heterogeneous sets of pragmatic rules" (65). Similarly, consensus cannot be the "end" of discussion because it presupposes "that humanity as a collective (universal) subject seeks its common emancipation through the regularization of 'moves' permitted in all language games and that the legitimacy of any statement resides in its contributing to that emancipation" (66). Lyotard, however, does agree with Habermas' focus on justice. Lyotard thinks that "justice as a value is neither outmoded nor suspect" but cautions that "we must thus arrive at an idea and practice of justice that is not linked to that of consensus" (66). David Hoy points out that this places Lyotard in a "weak position of seeming to ask paradoxically for consensus on his claim that dissensus is indeed the higher good" (166).

presupposes and draws upon the normative structures of social interaction; it does not cut the bonds of social integration as do social contract models" (54). For Habermas, social contract models depend on different versions of autonomy, both of which make social integration difficult. For instance, the parties to Hobbes' version of the social contract rely on "purposive grounds" so "that their reasons remain tied to the contingent interests and preferences of the participants" (*Justification and Application* 27). In contrast, since Kant's parties possess freedom of will, their agreements must be morally grounded, and thus "their reasons become independent from the egocentric perspective of the participants and are bound up with the discovery of norms that admit of general assent and the shared interests that underlie them" (28). Clearly, Habermas leans in the Kantian direction but believes that his version of "constructivism applies equally to practical and to theoretical reason" (30). Habermas believes that "we have an intuitive mastery of the language games of norm-guided action in which agents adhere to or deviate from rules while possessing rights and duties that can clash with one another and lead to practical conflicts understood in normative terms" (*Justification and Application* 32). As a result, "we are also aware that moral justifications resolve disputes concerning rights and duties, that is, concerning the rightness of the corresponding normative statement"(*Justification and Application* 32).

In *Between Fact and Norm*, Habermas argues that law offers a particular way to justify validity claims through both the universal, normative realm of the system and the particular area of the lifeworld. Law offers, that is, a discourse that can bridge the gap between lifeworld and system. The "ordinary language" of the lifeworld cannot address certain power structures. As Habermas explains, "the circuit of lifeworld communication

is interrupted at the points where it runs into the media of money and administrative power, which are deaf to messages in ordinary language" (56). Since law "communicates with the steering media of money and administrative power," legal discourse is "equally open to lifeworld and system" (56). Law translates normative messages in such a way that power structures can understand those messages. As Habermas explains, "normatively substantive messages can circulate *throughout society* only in the language of law" (56).

Habermas' claims for the power of legal discourse are quite interesting, especially when we consider those claims within the context of the use of legal discourse in late nineteenth and early twentieth-century literature. Through a close reading of legal discourse in the works of Alcott, Howells, James, and Wharton in the following chapters, I will explore the role of law as a means to articulate and to resolve ethical dilemmas. Thus, an understanding of law can enhance our readings of literary texts by helping us to tease out subtle nuances that might otherwise be overlooked. For instance, since contract theory contains within it the possibility of autonomy, our understanding of representations of agency in literary texts can be enhanced through exploring what individuals seem to choose and how they justify those choices when they enter legally significant contracts (for instance, marriage contracts and employment contracts) and ethical agreements not necessary enforceable in a court of law. Further, the complicated representation of rights claims—who has and claims certain rights, who has rights but does not claim them, who has rights but cannot claim them, how those rights are grounded (as in legal contract or ethical obligation), and how those rights are enforced—can both challenge and reinforce the contractual model justice.

CHAPTER TWO

"In Love and In Law": Legal Discourse in Selected Works of Louisa May Alcott[1]

"She was not alone, for good and evil spirits compassed about her, making that still room the battle-field of a viewless conflict between man's law and woman's love."
Louisa May Alcott, "M.L."

In "M.L.," Louisa May Alcott explores the complex "conflict between man's law and woman's love" by presenting an interracial relationship. Written in 1860 and rejected by the *Atlantic* as too controversial because, as Alcott explained in her journal, "it is antislavery and the dear South must not be offended" (*Journals* 98), the story finally found its audience through the *Commonwealth*, an abolitionist paper. The orphan Claudia falls in love with Paul Frere, a "pale bronze" man who passes as Spanish (5). However, Paul's past soon haunts the couple when Jessie Snowdon, a woman who is also attracted to Paul, figures out that he is a former slave when she sees the faint brand M.L. on his hand. The initials belong to Maurice Lecroix, and as Paul explains it, "Ten years ago he was my master, I his slave" (17). As it turns out, Paul's father was a Cuban planter and his mother "a beautiful Quadroon" (17). Though his father "often promised" Paul his "freedom," a gesture that seemed to Paul "a strange gift from father to son," his father died before making the proper legal arrangements (17). Paul and his half-sister Nathalie, "heiress" to his "father's name and fortune," were left alone, and while Nathalie "went to her guardian's protection," Paul went "to the auction block" where he "learned what it

[1] When Louisa May Alcott's younger sister May Alcott Nieriker died, Alcott assumed custody of May's infant child, Lulu, and Lulu eventually arrived in Boston accompanied by Sophie Nieriker, May's sister-in-law. After Alcott met Sophie, she described Sophie in her journal as a "charming sister in love or in law" (Myerson, *Journals* 227).

was to be a slave" (17). Several years later, Paul asked Nathalie, who was "mistress of her fortune now, and soon to be happy wife," to buy his freedom, and according to Paul, "she kept her word, and did a just deed generously, for money flowed like water until I was free. . . .I seared away all traces of a master's claim, and smiled as the flame tortured me, for liberty had set her seal upon my forehead, and my flesh and blood were mine" (19). Once free and owner of his own body, Paul "took the rights and duties of a man" and viewed them "as a sacred trust won by much suffering" (19).

With his past revealed, Paul considers Claudia his judge and pleads: "try my crime and adjudge my punishment" (21). However, the "appeal" is unnecessary because "judgment had been given long before the prayer came" (21). Claudia professes her love, but Paul urges her to think about the problems they will face. Ultimately, "woman's love" wins the "conflict" with "man's laws" as Claudia agrees to marry Paul despite her friends' protests, her "peaceful drawing room" having become "a chamber of the Inquisition, where a daily "Council of Ten" tormented her with warnings" (25). Their wedding "made its text, 'The love of liberty, the liberty of love'" (26), and the story ends with the couple at home with their children and a new circle of friends.

This story suggests the complicated view of law that runs throughout Alcott's work and highlights several tensions within contract theory itself. On the one hand, it is the failure of law, of the promise that all men are created equal, that casts Paul into the world alone, penniless, and a slave. As the illegitimate child of a Quadroon, Paul lacks the legal status to inherit according to the laws of intestate succession that determine who inherits property in the absence of a will. Though the story does not indicate whether or not Paul's father writes a will, he certainly has the legal right, as a male property owner,

to dispose of his estate however he wishes; yet, for whatever reason, he chooses not to provide for Paul's freedom or to recognize Paul in his will. As a woman, Nathalie's legal status also creates complications. Nathalie can buy Paul's freedom only *after* she gains control of her "fortune" and *before* she becomes "a happy wife." Indeed, absent the establishment of a complicated separate estate, Nathalie's property will most likely become her husband's under coverture (a common law doctrine that, through marriage, husband and wife become one person) unless she lives in a state with a Married Women's Property Act and even those acts were strictly interpreted by courts and did little to improve the legal status of married women. Thus, "man's law" seems highly problematic because it reinforces status-based relationships that seem unfair. Law here appears empty, divorced from true justice at least in part because it denies legal rights to many people.

However, the story also hints that law, particularly contract law, might provide the potential for change through voluntarily structuring agreements with others and thus eliminating or at least altering relationships previously defined through status. Thus, as many abolitionists and feminist reformers hoped, contract law may provide a possible path to freedom through self-ownership. For Paul, self-ownership—the moment when, as he puts it, "my flesh and blood were mine" (19)—marks the transition from status to contract, from slave to free man. Paul's description echoes the rhetoric of post-Civil War legal reform, such as the thirteenth, fourteenth, and fifteenth amendments to the Constitution and the Civil Rights Acts of 1866,[2] that posited freedom as "ownership of

[2] The thirteenth amendment, ratified in 1865, eliminated slavery and gave Congress the power to enforce the amendment. The fourteenth amendment, ratified in 1868, most notably guaranteed due process and equal protection rights; section one provides that "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

one's self and one's labor—the right to make contracts and to keep at least some portion of the fruits of labor" (Stanley 475). Once Paul owns himself, he also acquires "the rights and duties of man" (Alcott, "M. L." 19).

In "M. L.," contract appears in the form of a marriage contract, a type of contract typically associated with a loss of legal rights for women. Indeed, many nineteenth-century women's rights advocates associated marriage with slavery in order to suggest that both institutions reflect a loss of liberty in direct opposition to the freedom associated with contract. According to Elizabeth B. Clark, "slavery/freedom became the ruling paradigm through which liberal feminists conceived and developed their vision of rights within marriage" (30). Though Alcott later draws on the opposition of slavery and freedom to argue for rights for women, in "M.L." she emphasizes the significance of Claudia's choice and the power of contract to create voluntary social relationships. In its ideal form, contract offers the possibility to choose one's own ends, free from external restrictions. Most likely constrained by both laws and social customs that forbid miscegenation, Claudia acts anyway through a marriage that assumes ethical authority despite its ambiguous status under the law. Thus, in opposition to "man's law" stands "woman's love," embodied here in the marriage contract, as a compelling force in its own right. Alcott also complicates the opposition of love and law when she associates Claudia with law by figuring her as the moral judge who must hear Paul's confession and

---

the equal protection of the laws." The fifteenth amendment, ratified in 1870, gave the right to vote to former slaves. Despite these amendments, Black Codes continued to deny many of these rights to former slaves, and, as a result, the Civil Rights Acts of 1866 were enacted to secure contract and property rights. According to Stanley, "the right of contract was the cornerstone of the legislation" (475). Stanley also points out that only a few Radical Republicans, former slaves, and wage laborers criticized the Acts' emphasis on freedom of contract by arguing that "freedom of contract was illusory in the absence of economic independence and political rights" (475).

"try" his "crime" and "adjudge" his "punishment" (21).[3] Claudia's role as judge suggests that traditionally feminine virtues can provide the moral content law lacks.[4] For Paul, their love creates a "dangerous power" in him when he recognizes his ability to make Claudia happier than she has ever been; with that power comes "a sentiment that curbed a strong man's love of power, and left the subject to a just man's love of right" (8). Here, Paul's sentiment tempers power, and the result is a sense of justice—"a just man's love of right"—transformed by conflict. In "M.L." as well as numerous other works, Alcott undercuts the opposition of love and law to argue instead for transformed definitions of both.

Though the correlation of love and law runs throughout Alcott's work, no one pays much attention to the legal content of Alcott's work or the way her understanding of that content informs her representation of both love and law. Indeed, Alcott often describes individual characters and their relationships with others in legalistic, juridical terms. For instance, in *Work: A Story of Experience,* Christie Devon—who plays Shakespeare's famous female lawyer, Portia, defends her friend in a mock-trial scene, and finds her calling as a women's rights advocate—claims that she is "not a judicial woman" (273). Alcott also uses legal devices such as wills and contracts as metaphors for social relationships. "A Whisper in the Dark" centers on a "compact" between two brothers and formalized in one brother's will that their children, Sibyl and Guy, will marry each other. Similarly, *A Modern Mephistopheles* opens with a Faustian contract in which a struggling writer, Felix Canaris, makes a pact that eventually leads to fame,

---

[3] Alcott also presents women as judges in mock trial scenes in *Work: A Story of Experience.*

[4] Several literary critics suggest that Alcott's work argues that female virtue reforms male vice.

through the use of another man's work, and marriage to Gladys, another orphan left to make her way in the world.

As these examples suggest, law plays an important role in Alcott's work, and in the following discussion, I will explore the relationship between love and law in "A Whisper in the Dark," *Work: A Story of Experience,* and *A Modern Mephistopheles*. Particularly, I will focus on Alcott's representation of contracts, especially employment contracts and marriage contracts. Alcott's texts suggest that the marriage contract and the employment contract are closely related, even interdependent, and that our understanding of contracts should be situated within the philosophical context of the social contract. As social contract theory suggests, legal contracts, such as the employment contract (and to some extent the marriage contract), are presumed to reflect the freedom guaranteed by the social contract that creates a civil society in which autonomous individuals can express their autonomy by freely choosing the contracts they will enter. The social contract also provides for conflict resolution in that the state will resolve disputes, contractual and otherwise, through applying and enforcing an external standard of justice. However, as I suggested in Chapter One, social contract theory, at least its seventeenth and eighteenth century incarnations, contained within itself a fundamental contradiction because it did not contemplate the extension of autonomy, indeed citizenship itself, to women. Yet, as a part of everyday life in mid-nineteenth century America, women did enter contracts. Women like Christie Devon worked as seamstresses, actresses, governesses, and maids and thus entered employment contracts. Women like Sibyl, Christie, Gladys, and the famous March girls from *Little Women* entered marriage contracts. Alcott's works ask us

to contemplate both the limits and the possibilities of contract as a means to describe and to achieve justice, especially justice for women.

Alcott's personal letters and journals also dramatize these limits and possibilities as Alcott negotiates several subject positions; her letters and journals reveal her as at once the weak woman in need of masculine, paternal advice and as the self-interested bargainer capable of manipulating gender roles to advance her economic interests in a capitalistic marketplace. Alcott often actively negotiated contracts with her publishers and frequently asserted her legal rights as an author even as she maintained her feminine ignorance of legal matters and market oriented transactions. For example, in an October 9, 1856, letter to William Warland Clapp, Jr., editor of the *Saturday Evening Gazette*, Alcott proposed an ongoing relationship with the magazine in an effort to attain some financial security for her family. She asked Clapp if he would "engage" her "for a story each month for the coming six at fifteen or twenty dollars each as the length or excellence may vary" (17).[5] She astutely pointed to the demand for her work—"I have had other offers in advance of this"—even though she conceded that she was "not sure of their reliability" (17). Faced with the prospect of keeping the entire Alcott family financially afloat, she attempted to create a contract that would secure compensation for future stories. She even bargained for higher payment; two other stories previously published in the *Saturday Evening Gazette* earned only ten dollars each (*Selected Letters*, 17 note 1).

[5] In the next few pages, I will quote extensively from Alcott's letters. However, I have not used "[sic]" to indicate each error in these quotes. Since Alcott typically wrote quickly and often carelessly with regard to minor errors in spelling and punctuation, her letters contain so many minor errors that indicating each one seems disruptive. Thus, I followed the convention of Myerson, Shealy, and Stern (the editors of Alcott's letters) who left misspellings, non-standard contractions, and other minor errors intact and unacknowledged.

Her correspondence with James Redpath, who published the book version of Alcott's *Hospital Sketches* (a collection of stories about her experiences as a nurse during the Civil War) further suggests her careful attention to legal and economic issues and her ability to manipulate gender roles. With Redpath, Alcott often plays up her seeming ignorance of business matters in order to cast Redpath in the role of paternal advisor. Alcott wrote Redpath (the letter tentatively dated July 1863 by the editors) to clarify the terms of their "compact" (86). Apparently, a portion of the proceeds from sales was donated to a fund for Civil War widows and orphans. Alcott restated the agreement: "I believe stating it woman-fashion it means—I have five cents on each copy, you have ten to do what you like with & I'm not to meddle. Out of the ten you pay for the cost of the book & give something to the charity to which I heartily wish I could add my share" (86).[6] In a follow-up letter, also tentatively dated July 1863, Alcott pointed out that, due to her family's financial circumstances, she could not give more money to the Civil War fund:

> I return your contract signed. . . .About the dreadful percentage, over which I have puzzled my stupid head till I believe I understand it, I can only say that I too am sure that "he who giveth to the poor lendeth to the Lord" & on that principle [I] devote time & earnings to the care of my mother & father, for one possesses no gift for money making and the other is now too old to work any longer for those who are happy & able to work

[6] Apparently, there was some confusion about the terms of the contract. An editor's note summarizes Redpath's letter to Alcott: "for each copy in cloth sold at fifty cents, the 'orphan fund' would receive ten cents and LMA four; for each paperbound copy for Army reading, the orphans would receive five cents and LMA two" (*Selected Letters* 86 note 2). In another note, the editors quote an advertisement for *Hospital*

> for her. On this account I often have to deny myself the little I could do for other charities, & seem ungenerous that I may be just. (87)

Here, Alcott defended her decision not to give more to the charity on the grounds of filial duty and called attention to her apparent inadequacy in business matters.

Given her role as the family breadwinner, Alcott often attempted to earn as much as possible for her work, and given her limited success as an author until the publication of *Little Women* in 1869, she made the most out of what little bargaining power she had in the early stages of her career. For instance, since *Hospital Sketches* had sold fairly well considering that she was an unknown author, she sent several previously published stories to her publisher and suggested reprinting them. In an August 28, 1863, letter to Redpath, Alcott wrote the following: "Leslie printed one [story] but never sent me a copy or told me the date of its appearance. . . .I suppose I have a right to republish these things without asking their [Leslie and Fields] leave have n't I ? (89).

The right to republish her work and to retain copyrights whenever possible continued to be important to Alcott throughout her career. To secure these rights, Alcott negotiated with her publishers as both a self-interested bargainer and as a woman who needed advice and guidance. Redpath apparently offered to purchase the copyright for *Hospital Sketches*, and Alcott astutely deferred her decision until she gathered information about her legal rights. She eventually decided not to "part" with the copyright and instead offered Redpath "as many" of her stories as he wanted for the Campfire series of dime novels that he had in mind (97). However, she did ask Redpath

---

Sketches: "besides paying the Author the usual copyright, the publisher has resolved to devote at least five cents for every copy sold to the support of orphans made fatherless or homeless by the war" (86 note 2).

about her future rights if she contributed to the Campfire series: "I suppose if my stories are printed in the 'dime set' they can still be gathered into one volume at some time with others, if we think best?" (98). In the same letter, Alcott also asserted her growing power as an author by carefully reminding Redpath of her other offers even as she highlighted her apparent ignorance in business matters:

> My time seems likely to be pretty fully occupied if I accept all the offers made me. Leslie asks for several more tales, Fields wants another in "the Brothers" style, & Richardson the unknown makes a proposal which I send for you to see, & if you will be so kind, to give me your opinion of the enterprise. (97-98) [7]

Redpath apparently responded with some explanation of which stories he wanted for the Campfire book and how much money she would be paid for her work. However, Alcott did not agree with his assessment, and she provided a detailed response that shows her financial sense as well as her willingness to bargain for a different arrangement:

> My only objection to your plan is that I dont see where the double pay comes in. The old stories were never well paid for & I thought some time I'd make a book of them as you suggested—but if I tag one of the best [stories] onto a new one I get nothing for it, it is lost to the book & done with for ever. . . .If you can let me have ten or twenty dollars it would be a great favor[.]. . .[S]undry expenses must be incurred & I rather depended on "my works" to supply the necessary funds. (98)

[7] Alcott also explained her situation in a letter to Mary Elizabeth Waterman. Alcott told Waterman that she had not written for a while because she had been busy "wrestling with three publishers" (95).

Alcott thus emphasized her ownership interest in what she referred to as "my works" and implied that she had relied on the money she expected her work to earn.

Alcott soon learned that she needed to be even more diligent in order to secure her rights to her work. Ripley Bartlett protested the republication of "King of Clubs & Queen of Hearts" because his magazine, *The Monitor*, had retained the copyright after originally publishing the story in 1862. Alcott described the situation in her journal as "a little skirmish with Ripley Bartlett about 'King of Clubs and Queen of Heart" (127). As Alcott explained it,

> I did not know that it was copyrighted so gave it to Redpath and his highness Rip made a great stir about it. Demanded money, threatened law, wrote insulting letters & behaved in such a manner that my doubts as to sanity were set at rest forever. He finally gave us the right of publishing our own story & I am done with the dog in the manager. Shall look well after my copyrights in future. (*Journal* 127-28)

Alcott was even more vehement about the situation in her letter to Redpath: "I said to Bartlett when I gave it to him that I wished to be at liberty to do so [republish] by & by if I chose. [He made] no objection & as I did not know that the Monitor was copyrighted I never though of asking his leave to print my own story" (*Selected Letters* 102). Alcott also clarified that she did not believe they had "done anything unlawful or unjust" (102).

Redpath's response apparently indicated some resolution of the Barlett matter and expressed some concern about James T. Fields' offer to publish her novel *Moods*. On the Barlett matter, Alcott merely noted that "the literary laws are just" and that she intended to "abide [by] them" (102). About Fields' offer, Alcott downplayed Redpath's

concerns: "[B]e assured I have no intention of changing 'my publisher'[.] . . .He wont have "Moods," unless you get tired of your bargain & send me adrift" (102-3). Alcott also worried about what Fields might expect if she continued to publish stories in *The Atlantic* so she asked for Redpath's advice, perhaps in an effort to assure him of his position as her main publisher as well as to remind him again that she had other outlets for her work: "F[ields] likes my stories & pays promptly & well for them, but if I go on writing for him wont he expect to print them if I ever want them in a book?"(103).

As her correspondence with Redpath indicates, Alcott often played her publishers against each other in order to secure the best venue and compensation for her work. For instance, Redpath and Roberts Brothers apparently discussed who would publish Alcott's collection of fairy tales. Alcott wrote Redpath that she had received a note from Roberts Brothers about Redpath's rights to the fairy stories, and she let him know that she was well aware of her legal rights:

> I had no intention of doing anything with "Rose Family" which is your property, but I did wish to have the Brothers to get up my book of fairy tales, & think they are still mine to do as I like with as you told me when I saw you some time ago that you did not feel able to get them up in the expensive way they should be done, also that such books were not very profitable, & let the whole thing rest after I had hurried to get them ready as you said it took a good while for illustrations.
>
> I have signed no contract about them & as you have no new books or tales of mine in hand, or any still unsettled for I believe I am at liberty to dispose of the fairy tales to whom so ever will do them to suit me. (105)

Alcott clearly states her rights and at the same time reminds Redpath that his actions indicated that he did not intend to publish the book and that, in any event, she was not obligated under a contract.

After the phenomenal success of *Little Women*, Alcott had even more problems with her copyrights. Though Thomas Niles of Roberts Brothers advised Alcott to retain the copyright for *Little Women* along with royalties of 6.66 percent for each copy (Stern, *Louisa May Alcott* 174), the arrangement could not protect Alcott's rights outside the United States.[8] Even in the United States, her former publishers rushed to reissue her work, and she was extremely disturbed when Loring reissued *Moods* (the heavily revised version he originally published in 1865) without her consent. Unable to do much about the matter herself since she was in Europe at the time, Alcott expressed her anger in a letter to her family: "I told him [Loring] not to do it, and he said he would'nt, for there was no call for it, for it is not my Book. So I wish Papa would see if it can't be stopped. Niles will know if I haven't the right to do it. I have the copy right and don't wish the book sold as it is" (*Selected Letters* 142 note 2). Alcott's anger increased when she finally heard from Loring. According to Alcott, "the dreadful man says that he has a right to print as many editions as [he] likes for fourteen years!" (142 note 2). Alcott ranted about the inability of the law to protect an author's rights: "What rights has an author then I beg to know? And where does 'the courtesy' of the publisher come in?. . .If the law gives over an author and her work to such slaverey, as L [Loring] says, I shall

[8] In a letter to Samuel Joseph May, Alcott explained that *Little Women* was "selling in England & though I get no copy right it help to make 'my works' known" (121).

write no more books but take in washing and say adieu to glory" (142 note 2). Here, Alcott clearly felt legal contracts undermined rather than secured her autonomy.

After the incident with Loring, Alcott grew skeptical about the power of the law to protect her rights. Indeed, she once wrote Edward Marston, a representative of her English publisher Sampson and Low, "I have given up expecting anything like honesty. . .for I cannot discover any laws to protect authors, & till there are some I suppose we must do the best we can" (180). For Alcott, contract now seemed to create conditions of servitude rather than freedom.[9] When Sampson and Low sent her a contract "giving them 'the sole right to print during the legal term of copy right,'" Alcott hesitated and as she explained to her sister, "if that means fourteen years as Loring says, I prefer not to do it" (142-43 note 5).[10] In her negotiations with Scribners for *Eight Cousins*, Alcott again turned to the issue of copyright law. In an October 30, 1874, letter to Scribners, Alcott pointed out that "if the copyright matter annoys publishers it certainly bewilders authors & leaves them in very defenceless positions at times, for there seems to be no law to guide or protect them" (186). Scribners also must have been concerned that Low would serialize *Eight Cousins* in England and that some English periodicals would reach the

---

[9] Perhaps in an effort to protect her rights, she urged Niles to acquire her old stories whenever possible. In an August 7, 1870, letter to Niles, Alcott wrote: "If a chance ever comes to get hold of 'Morning Glories' please do it for me" (145). She also suggested republishing old stories that she had retained the right to use and told Niles: "Ford and Fuller have some good ones, and I have the right to use them" (145).

[10] Alcott later wrote of several problems with Low. In an October 5, 1873, letter to Edward Marston, a representative of Low, Alcott alluded to an earlier letter that described her understanding of the contract: "I am sorry you think my letter cruel for it was not intended to be unjust, but merely an expression of dissatisfaction of the state of the accounts" (179). After explaining her problems with the accounts, particularly the percentage of her share of the profits, she told Marsten that "as the half profit plan does not suit us at all we prefer to have all future books on the other plan if you please" (179).

United States before Scribners published the novel. Alcott's letter addressed the legal intricacies of protecting the United States market as much as possible:

> I think if I instruct Low to print the first chapter in pamphlet form & have it out by Dec 15th that it will be all right. Also tell him that it must not appear in English magazine or book-form in this country. Does not that protect us all & make things safe on both sides of the water? (186)[11]

Another letter to Scribners indicated that it was "too late to undo the bargain" with Low, and the first installment of *Eight Cousins* would come out in England, though the publication would be after the United States printing (188-89). Alcott again attempted to explain the situation to Scribners:

> Low also says that I made no restrictions in my first offer to him, which is true, nor did I think it necessary. I sold him the story for publication in England, & if he prints it there or causes it to be printed there to send to the United States, he does it on his own responsibility.

---

[11] Alcott also described the situation in some detail in a letter to Mary Maples Dodge. Alcott wrote:

> I make an agreement with S. & Co [Scribners] about Eight Cousins exactly as I have always done with other serials. Reserving all rights to the tale outside their magazine. Among these rights is that of selling it as a serial in England which gives me my copy right there & secures the book hereafter. Of course I protect S &Co by forbidding the tale to appear in this country in any English magazine, & if it does I have the power to stop it.
>
> If I do not secure myself in England S & Co as well as myself are at the mercy of any English publisher who choose to take the story.
>
> S & Co agree as a matter of courtesy, & then proceed to put so many obstacles in the way, & make so many stipulations that the English publisher is perplexed, & I shall probably lose the sum he offered me for the tale in order that he might keep control of the serial. I telegraph, write, explain, & try to be as obliging as I can. Change the name of the tale to suit others, put in babies to suit the artist, & endeavor to go on writing with the whole affair in such a coil that my genius refuses to burn & the story is put away till calmer times. (187-88)

> All I can now do is what I have proposed before (& what Mr. Smith says is all that is necessary to make you easy) namely—that if you object to Good Things [the English periodical that would publish the first chapter] coming here I shall write Low to that effect, & if it does come here I shall prevent its sale as I have a legal right to do. (188-89)

Alcott was even more emphatic about her rights in a letter to Richard Rogers Bowker, editor of *Publisher's Weekly* and *Library Journal*. Though the context is not entirely clear from the letter, Bowker had apparently asked about Alcott's relationship with Low because Alcott began the letter by pointing out that "Low honorably pays me for all books of mine which he publishes" (223). Alcott then stated: "I recognize no other person's right to bring out the books, & receive nothing from such piratical publications, which have been a great injury to me pecuniarily" (224).

As her personal letters and journals suggest, Alcott clearly recognized both the limits and possibilities of contract law to protect her economic interests. In addition, Alcott experienced and negotiated a fundamental tension within contract law. Though social contract theorists and nineteenth-century reformers hoped that contract could provide the path to freedom, contract also helped perpetuate conditions that frustrate freedom and that facilitate commodification. For instance, Alcott's increasing fame also led to a loss of privacy, and a loss of self, that Alcott often compared to losses experienced by a slave. In a letter to a Mrs. Woods, Alcott complained about public attention that intruded on her personal life: "I wish you'd write an article on the rights of authors, & try to make the public see that the books belong to them but not the peace, time, comfort, and lives of the writers. It is a new kind of slavery & these horrid Paul

Prys must be put down" (193).[12] Here, Alcott implied that authors should have a right to privacy, a position that Warren and Brandeis extend to all individuals in their famous essay "The Right to Privacy," which was published in 1890 in the *Harvard Law Review*. Alcott herself discussed a "right to privacy" in a December 18, 1885 letter to Viola Price, a literary critic who apparently inquired about Alcott's writing habits, favorite authors, and favorite magazines. After answering several of Price's questions, Alcott explained: "I dislike to receive strangers who come out of mere curiosity, as some hundreds do, forgetting that an author has any right to privacy" (296).

While contracts provide the potential to secure the right to compensation for her labor, employment contracts, especially those concerning copyright issues, also involve a loss of some kind, and Alcott often expresses this sense of loss through the analogy to slavery. On one hand, slavery is often viewed in opposition to the freedom reflected in the ability to earn wages for work; thus the power to contract, to reap the rewards for one's own labor, seems synonymous with freedom. However, for Alcott, contract itself often made at least one of the parties a slave, of sorts, to the other party; thus, at the same time a contract can reflect or create equality, it can also reflect or create inequality. This paradoxical quality of contract becomes apparent in Alcott's representation of employment contracts and marriage contracts in her literary works.

In order to understand fully the implications of contract theory in Alcott's work, I will draw on Carole Pateman's *The Sexual Contract*. Pateman highlights the limitations of contract as an instrument for feminist reform, and her work points out that women are

[12] An editor's note explains that Paul Pry was a well-known comic character who "was always meddling in other people's affairs" (193 note 2).

excluded from participation in the social contract and thus do not enjoy the same status in civil society as autonomous citizens that some men possess. As Pateman suggests, Locke's version of the social contract appears to extend new rights to women. For instance, Locke recognizes the contractual nature of marriage when he points out that "conjugal society is made by a voluntary compact between man and woman" (Locke, *Second Treatise* 300), and even goes so far as to suggest that he sees no reason "why this compact, where procreation and education are secured, and inheritance taken care of [for the children], may not be made determinable" (301). In some cases, the wife has "a liberty to separate from him, where natural right or their contract allows it" (302). However, Pateman reveals that Locke's emphasis on marriage as voluntary amounts to patriarchal domination cloaked as freedom, and natural right and the terms of the contract itself are problematic grounds for the "liberty" he notes.

Though Locke appears to extend liberty to women, his scheme does not recognize the same kinds of natural rights for women that men possess. When Locke attempts to account for a situation in which the couple might have "different wills" (302), equality becomes an empty promise for women. Locke argues that when it is "necessary that the last determination [the final judgement] . . . should be placed somewhere, it naturally falls to the man's share, as the abler and stronger" (302). A man's power to determine extends "to things of common interest and property" and "leaves the wife in the full and true possession of what by contract is her peculiar right, and at least gives the husband no more power over her life than she has over his" (302). A woman's right is indeed "peculiar" in this situation since her right does not guarantee much of anything at all.

Pateman argues that the problems for women go much further than the inability to own property. As she points out, Locke needs to differentiate his theory from the classical patriarchalism of Sir Robert Filmer's *Patriarcha.* In defense of absolute monarchy, Filmer argues that political authority is paternal: "As the Father over one family, so the king, as father over many families, extends his care to preserve, feed, clothe, instruct and defend the whole commonwealth" (12). Because Filmer equates political right with paternal right, Locke must counter this argument in order to justify a non-monarchical form of government. By positing contractual rights rather than paternal, patriarchal rights as the source of political rights, Locke seems to define contract in opposition to patriarchy.

Pateman deconstructs this part of Locke's argument and reveals his ambivalence about marriage. Contra Locke, Pateman instead argues that "contract is the means through which modern patriarchy is constituted" (2). More specifically,

> Political right originates in sex-right or conjugal right. Paternal right is only one, and not the original, dimension of patriarchal power. A man's power as a father comes after he has exercised the patriarchal right of a man (husband) over a woman (wife). The contract theorists had no wish to challenge the original patriarchal right in their onslaught on paternal right. Instead, they incorporated conjugal right into their theories and, in so doing, transformed the law of male sex-right into its modern contractual form. (3)

In order to illustrate her point, Pateman emphasizes Locke's distinction between the natural right of father over son and political right:

> What I take to be political power, that power of the magistrate over a subject may be distinguished from that of a father over his children, a master over his servant, a husband over his wife, and a lord over his slave. (Locke, *Second Treatise* 262)

To make his case, Locke argues that mothers have "equal title" to the share of power over children and that this power can more accurately be described as "parental" rather than "paternal" (287). However, Locke asserts the equality between husbands and wives only in the private, domestic realm and only with regard to raising children. As Pateman notes, "paternal right is not political right; only civil society is a properly organized political society" (93). Thus for Patemen, both Locke and Filmer agree "that there is a natural foundation for a wife's subjection" (92). Pateman argues that conjugal sex right is the source of this subjection: "the 'original' political right or government was, therefore, not paternal but conjugal" (93). As a result, "the meaning of the individual and the social contract depend upon women and the sexual contract" (221). Her critique reveals that while Locke uses women to counter Filmer's assumption that political right originates in paternal right, at the same time that Locke appears to grant women new rights based on "equal title" to parental authority, Locke limits those rights to the natural, non-civil, private sphere so that women cannot really enter civil society as participating individuals in Lockean terms.[13] The universal political individual acting in the public sphere is particularly masculine, a member of what Pateman calls "civil fraternity" (78). Thus, the modern form of patriarchy is not paternal; instead, "in the modern world, women are

[13] According to Pateman, "women are incorporated into a sphere that both is and is not civil society. The private sphere is part of civil society but is separated from the 'civil' sphere. The antinomy private/public is another expression of natural/civil and women/men" (11).

subordinated to men *as men* or to men as a fraternity. The original contract takes place after the political defeat of the father and creates modern *fraternal patriarchy*" (3, emphasis in original). In the following sections, I will draw on Pateman's insights to provide new readings of Alcott's works.

"A Whisper in the Dark"

Several of Alcott's thrillers provide some evidence of her misgivings about the position of women within a Lockean system of rights and justice promised by the social contract. Leona Rostenberg and Madeleine Stern's discovery of Alcott's thrillers led to a significant reevaluation of her work in the late twentieth century, and the view of Alcott as primarily a writer for children is changing since some critics now focus on much darker characters than the famous March girls from *Little Women.* Many of Alcott's thrillers suggest that gaining control, particularly in marital relationships, represents a major issue confronting women; as Stern points out, "the sexual struggle for power. . .is a theme that runs consistently throughout most of the Alcott thrillers" (Stern, *Collected Thrillers* xxiii). Law also plays a significant role in such power struggles, and I will explore that role in greater depth through an extended reading of "A Whisper in the Dark." Lynette Carpenter suggests that the "moral" of "A Whisper in the Dark" might well be "rule yourself, lest you be ruled by another" (32). Thus the story teaches its audience "the dangers of anger and the wisdom of self-control" (31). An attention to legal issues in the story enhances Carpenter's reading because characters often rule each other by exercising legal rights and calling on legal and ethical duties. Similarly, the

"dangers of anger" Carpenter highlights are embodied in legal instruments that discipline, to borrow Foucault's term, expressions of anger that fall outside legally sanctioned avenues for presenting claims of injustice.

The plot of "A Whisper in the Dark" centers on a "compact" between brothers that provides for their children, Sibyl and Guy, to marry each other (33). Guy's mother is only briefly mentioned, and readers initially believe that both Sibyl's mother and father died when Sibyl was a young girl. The family relations are complicated further since the brothers are not related by blood, and even explaining these relationships is difficult because Alcott, perhaps in a subtle commentary on the paternal element of patriarchal authority, does not refer to the brothers by name. As an adopted child, Sibyl's uncle, Guy's father and Sibyl's guardian since she was six, did not inherit equally with Sibyl's father, the biological heir. The unequal distribution of the estate apparently troubled Sibyl's father; to remedy the situation, Sibyl's father proposed a "compact," later formalized as a provision in his will: "your boy shall have my girl, and the fortune I have innocently robbed you of shall make us happy in our children" (44). At age seventeen, Sibyl goes to live with her uncle and Guy at her uncle's request. She learns about the provision, refuses to comply, and ends up imprisoned by her uncle in an attempt to gain control of her property. In a significant plot twist, Sibyl learns that her mother is actually alive and also a prisoner in the same house as is Sibyl. All of these twists and turns involve different accounts of Sibyl's father's will and the compact between the brothers.

Interestingly, Alcott refers to the provision of the will about Sibyl's marriage as part of the will and as a "compact" and a "contract." Since wills and contracts are distinct legal devices with distinct purposes and functions, the slippage among the terms

seems significant, especially given Alcott's knowledge of and experience with legal devices and terminology. Indeed, contract and inheritance by will are often theoretically opposed, as Locke's use of contract to counter Filmer's claim that paternal right justifies political authority indicates. Thus, contracts seem to provide a way to level the playing field by eliminating status-based relationships linked to inheritance practices. By linking contract and inheritance, Alcott implies that contract may not provide the freedom and equality it seems to guarantee, at least in part because traditional, hierarchical inheritance practices not only persist but are themselves contractualized. At the same time that they offer greater equality, contracts, then, can mask both paternal authority and sex right (to borrow Pateman's term) as sources of the subjection of women.

The opening scene of "A Whisper in the Dark" highlights the link between contract and inheritance. Indeed, the relationship between Sibyl and her uncle suggests that sex right, often thinly disguised as filial obedience, is a major factor in the subjection of women. When the story begins, Sibyl and her uncle are traveling by carriage to his home because he wants her to meet Guy. At first, Sibyl innocently flirts with her uncle in an effort to learn more about Guy, and she then persists because she believes that "a too early submission now" might "mar" her "freedom in the future" (33). The flirtation soon turns into a sexual battle of wills. After Sibyl climbs into her uncle's lap and "daintily" kisses him, he holds her "fast," and in Sibyl's words, "deliberately returned my salute on lips, cheeks, and forehead, with such warmth that I turned scarlet and struggled to free myself. . .and commanded him to let me go" (33). However, her uncle refuses and justifies his actions by claiming paternal authority through indirectly comparing his relationship with her to his relationship with his son Guy; he tells her,

> You came here for your own pleasure, but shall stay for mine, till I tame you as I see you must be tamed. . . .I possess experience in the work; for Guy, though by nature as wild as a hawk, has learned to come at my call as meekly as a dove. (33)

Here, her uncle makes clear he expects filial obedience and will teach her how to comply with his wishes if she does not readily do so. However, as the sexual overtones of their discussion suggest, paternal authority alone does not provide a complete description of the power dynamic at work in this scene.[14] Indeed, Sibyl's uncle asserts his power over Sibyl as a man, not as a father.

The actual terms of the will/contract further connect inheritance and contract. Since Sibyl is, as she admits to Guy, "ignorant as a baby" in matters of her "own affairs," she receives most of her information from Guy (38). Guy explains that her father's will gives her "possession of the old place at eighteen," and from that time she will own "the lovely gardens, these moors, and the forest stretching to the sea" (38). Guy also recognizes his father's power and tries to warn Sibyl. Guy tells her that "as your guardian, my father. . .is to share your home until you marry" and also points out that his father "will be tempted to remain a fixture with you on his knee as 'Madame my wife'" (38). Indeed, Sibyl's uncle himself later admits to her, "I shall hold you fast till some younger guardian comes to rob me of my merry ward" (40). Though Sibyl may come to

---

[14] As Pateman suggests, "conjugal power is not paternal, but part of masculine sex-right, the power that men exercise as men, not as fathers" (22).

own the property at age eighteen, it is important to remember that she is at this point but seventeen and still a child subject to her uncle's guardianship.[15]

Further, if Sibyl marries Guy, she will most likely lose control of her property even though as a single adult woman she would be "on a legal par with men in property rights" if not political rights (Salmon xv). In the United States, coverture—"the state of a married woman. . .under the cover or power of her husband" (Tyler 312)—prevailed until the mid nineteenth century. More specifically, "by the marriage the husband and wife are one person under law, and upon this principle of a union of person depend almost all the legal rights, duties, and disabilities that either husband or wife acquire by the marriage" (312). Sibyl might retain some rights to her property if she lived in a state that had enacted a Married Women's Property Act. These Acts "generally authorized [married women] to hold property, contract, and sue in their own names," and married women were "put more or less on the footing of unmarried women, except as to criminal liability, and dealings with their husbands" (Kent 130 note 1).[16] In the absence of a

---

[15] According to Ransom H. Tyler's 1868 treatise, *Commentaries on the Law of Infancy and the Law of Coverture*, "legal infancy ends at twenty-one years" in most American jurisdictions (34). However, in some states, females reach majority at age eighteen because females "mature about three years earlier than males" (34). Tyler also cites ancient Greek and Roman law as authority for the proposition that "women were never of age, but were subject to perpetual guardianship" until marriage (35).

[16] In "Married Women's Property Law: 1800-1850," Richard Chused explains that the legislation was enacted in three waves. The first statutes appeared in the 1840s and "dealt primarily with freeing married women's estates from the debts of their husbands" and "left untouched the traditional marital estate and coverture rules" (1398). The second group, enacted over a twenty-year period from the early 1840s until well after the Civil War ended, "established separate estates for married women" (1398). The last statutes were passed in the late nineteenth-century and provided that married women could keep their wages (1398). Alcott's home state, Massachusetts, passed Married Women's Property Acts that followed this trajectory in 1842, 1845, and 1855. For detailed accounts of Massachusetts' approach, see Richard H. Chused, "Married Women's Property and Inheritance by Widows in Massachusetts," Marylynn Salmon's *Women and the Law of Property in Early America* chapter 6, and Tyler's summary of Massachusetts law at pages 693-706. For more general histories of Married Women's Property Law, see Peggy Rabkin's *Fathers to Daughters: The Legal Foundation of Female Emancipation* and Norma Basch's *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York.*

Married Women's Property Act, married women could also hold property in a trust through a separate estate. In most cases a male relative, usually a father or brother, set up a trust in order to shield the wife's inheritance from a husband who lacked business skills or, even more likely, did not get along with his wife's family.[17]

However, as Alcott illustrates in "A Whisper in the Dark," the ability to own property, while an important step, does not automatically secure one's rights. Though Guy, as a man, is presumably capable of acquiring property and becoming a Lockean political subject in its fullest sense, he, like Sibyl, is the object of a contract beyond his control. Indeed, the precariousness of his position as an object of rather than a party to the contract contributes to Alcott's critique of paternal authority as well as its contractual replacement. Guy reluctantly agrees to marry Sibyl even though he "never liked the bargain" (41). As an object of the contract, Guy is not in a position to bargain and must "reconcile [himself] to being sold" (41). He views his "liberty" as the "price" he must pay to get control of Sibyl's property in order to keep his father out of debtor's prison

---

[17] Alcott's mother, Abba May Alcott, actually owned property she inherited from her father, Samuel May, in a separate estate. After her father's death, Abba petitioned the probate court to appoint Samuel Sewall and her brother, Samuel May, as her trustees (Elbert, *Hunger* 68). Sarah Elbert quotes from probate records that indicate "one thousand and fifty dollars, being Mrs. Alcott's share of the residue and remainder [were]. . .to be held in trust for her separate use according to said will" (68-69). Abba's father did not like Bronson Alcott, at least in part because Bronson never adequately provided for the financial needs of his family. Bronson owed May several thousand dollars when May died, and though May forgave a similar debt owed by another son-in-law, he did not do so for Bronson (Elbert 43-44). Bronson's creditors also sued the May estate to access Abba's share to repay the debts. (44). According to Elbert, May and Sewall eventually decided to buy a house for Abba, as May explained in a letter to Ralph Waldo Emerson: "Mr Sewall and myself are bound as trustees to see that whatever may be bought with Abba's money is secured to her and her children as far as any legal protection can secure it" (qtd. in Elbert 69). As Abba Alcott's situation indicates, the establishment of separate estates was rather complicated and the resulting trusts offered limited protection. As Tyler points out, "the language of the trust is usually interpreted to sustain the marital rights of the husband, if it can, by any reasonable construction, be interpreted to the effect that object" (430).

(42). Here a sense of filial duty compels Guy to keep a bargain he did not freely choose to enter.

In addition to the provision that provides for their marriage, the will also contains a provision that gives Sibyl the right to refuse consent, a right synonymous with the voluntarism characteristic of contracts. She learns about her right only when she accidentally overhears her uncle caution Guy to treat her carefully because "she may refuse to fulfill her part if she learns that the contract is not binding against her will" (41). This knowledge, like the notion that parties freely choose to enter the agreements they make, gives Sibyl a sense of power; her right to "annul the contract. . .makes [her] mistress of them both" (42). However, Sibyl soon learns that without the power to enforce it, this right means nothing. When her uncle asks her to read the will, the version she receives does not mention her right to refuse consent. Though Sibyl questions her uncle about the omission, he merely reminds her of his (and her father's) paternal authority by mentioning the "dead and living fathers to whom they [Sibyl and Guy] owe obedience" (43).

In response to this paternal justification for her obedience, Sibyl attempts, in the tradition of the finest contract theorists, to write her own "declaration of independence" and tells her uncle that she will not obey her father's "wish" (43). As Sibyl puts it,

> Why should I [honor the compact]? It is not binding. . .and I'm too young to lose my liberty just yet; besides, such compacts are unjust, unwise. What right had my father to mate me in my cradle?. . .I'll not be bargained away like a piece of merchandise but love and marry where I please. (43)

Despite her appeal to justice, her declaration of independence does not mean much in the absence of legal recognition of what she perceives as her natural rights.

In an effort to bait her uncle, Sibyl then claims that she does not love Guy, and her uncle mistakenly assumes that she loves him and proposes marriage. He asks, "you reject the son, will you accept the father?" (44). When Sibyl does not immediately answer, he reinforces his argument by again claiming his paternal authority and goes a step further than calling himself "father" (45). He addresses her as "child" and orders "it must be—come, I implore, I command you" (45). Once again, paternal authority is not the sole justification offered for Sibyl's obedience. Here, the marriage proposal, and by implication the marriage contract itself, subtly disguises the claim for sex right inherent in his justification for her obedience. As Patemen suggests, "the sexual contract is very hard to discern because it is *displaced onto the marriage contract*" (110, emphasis in original).

Guy's response to his father's proposal reveals a tension with contract theory: entering a contract necessarily involves some loss of self even as it attempts to preserve that self. Even though Sibyl refuses her uncle's offer and argues that she will not accept him or his "gifts" (45), Guy interrupts before he hears Sibyl's answer and concludes that she loves his father. Guy calls Sibyl's attention to what a marriage contract with his father might be like and tells her, "I hope you enjoy your bonds as heartily as I shall my escape from them" (45). To his father, Guy again points out his reluctance to sell himself: "I had rather be the vagabond this makes me than sell myself, that you may gamble away that girl's fortune as you have your own and mine" (45). The marriage

contract emerges as a "bond," then, with a dual nature; what can be a meaningful connection can also be a constraint.

Sibyl is literally constrained, however, when she continues to resist her uncle's wishes. Indeed, her resistance is characterized as madness, and this characterization seems particularly important given the importance of establishing a legal right to the estate. Even given the limited effectiveness of separate estates and Married Women's Property Acts, the fact remains that Sibyl could retain some control over her inheritance even if she marries Guy. By declaring her legally mad, Sibyl's uncle, as her guardian, retains the right to control her property just as he literally controls her body when, with the help of an unscrupulous doctor, he drugs and imprisons her. Her uncle's actions then gain legal justification when a lawyer visits Sibyl and apparently declares her mad (53).

Sibyl eventually escapes only after she receives a series of messages from her mother whose voice Sibyl hears whispering in the dark. The reason that both of them are being held captive becomes clear when Sibyl learns of yet another provision in her father's will. As Sibyl puts it, "if it should appear that I have inherited my mother's malady, the fortune should revert to my cousin with myself a mournful legacy to be cherished by him whether his wife or not" (57). As this provision suggests, the will and Sibyl's legal rights afforded by it, provide both the means for her liberation and her repression. If she can inherit her father's estate and control her own property, then she is one step closer to achieving full citizenship. However, by limiting her rights if she inherits her mother's madness, the will also becomes another means for her repression. The construction of Sibyl and her mother as mad confines them, literally, to the private, domestic sphere and becomes the grounds for the denial of virtually all their rights.

In the conclusion, Sibyl finally escapes when the doctor accidentally sets fire to the house where Sibyl has been confined. She meets Guy, who is on his way to rescue her after hearing his father's deathbed confession, as she flees the burning building. As several critics point out, the language describing their reunion implies that their future together might not be entirely happy. When Guy pulls her into a carriage, she can only lie passively, just as she did in the opening scene when her uncle drugged her. As Sibyl explains, "with a vain struggle, I lay panting in my captor's hold, fearing to look up and meet a brutal glance" (57). Just as his father restrained her in the opening scene, Guy "seize[s] her tenderly" and, again like his father, calls her a "child" (57). Sibyl's description of their situation highlights the "bond" between them and the submission it requires: "Guy poor again, I free, the old bond still existing, the barrier of misunderstanding gone—it was easy to see our way, to submit" (58). Though Sibyl and Guy do marry, the bond she alludes to does not refer to the marriage contract. The old bond instead refers to the provision of Sibyl's father's will/contract that provides for her marriage to Guy so that Guy might inherit a share of the estate that was denied to his father.

Law also seems significant when Alcott renders poetic justice on several wrongdoers. Both Sibyl's uncle and the doctor receive their just rewards for their actions. As Sibyl explains, "retribution speedily overtook them both, for Dr. Karnac paid his penalty by the sudden death that left his ashes among the blackened ruins of that house of horrors, and my uncle had preceded him" (58). However, though Alcott provides swift justice, the lawyer apparently escapes without punishment and does not reappear in the concluding scene. The lawyer's absence suggests Alcott's ambiguous feelings about the

power of law, particularly contract law, to provide for real improvements in the lives of women as well as others who may not have access to all that the law can guarantee. In the end, the law, embodied in the lawyer, goes unpunished for its role in Sibyl's fate. Alcott, then, leaves open the question of whether law can effect change and create just social relationships or whether law fails, under its own standards of justice, to redress the very wrongs it sometimes helps to create.

"I am not a judicial woman": Christie's Contracts, Claims, and Calls for Justice in *Work: A Story of Experience*"

Alcott again turns to law in *Work: A Story of Experience,* a novel that centers on Christie Devon's experiences when she leaves her home to become a working woman. The vocabulary of contract law, in particular, plays an important role in the text because Alcott carefully describes each of Christie's many employment contracts and marriage offers as well as the relationships that her employment contracts and marriage contract establish. Alcott also sets the novel against the backdrop of the Civil War—a moment at which the social contract almost reaches its breaking point. Throughout the novel, Alcott presents both employment contracts and marriage contracts in ways that emphasize the voluntary nature of contractual relationships while at the same time exposing economic inequities that limit the ability of contractual ties to create and to structure just social relationships. Alcott, then, calls attention to the material conditions that limit hypothetical freedom of contract.[18]

---

[18] Contemporary reviewers of *Work* tend to focus on the novel's shortcomings, particularly its didactic elements. While admitting that *Work* is "both an interesting and entertaining narrative," an anonymous reviewer for *Harper's New Monthly Magazine* maintains that "the novel is not a novel at all, but a serious didactic essay on the subject of woman's work" (*Critical Essays on Louisa May Alcott* 186). Similarly, an

Given Alcott's attention to material conditions, many read *Work* as a sociological novel that draws heavily on Alcott's personal experiences, particularly with transcendentalism, communitarianism, and feminism. [19] Jean Fagin Yellin describes the novel as "semi-autobiographical," and points out that as the daughter of "feminist abolitionist communitarians" and a friend of transcendentalists Ralph Waldo Emerson and Henry David Thoreau, Alcott occupies a unique position "near the center of many of the radical movements of her time" (527). Sarah Elbert highlights Alcott's "allegiance to a liberal woman's rights program" and argues that her fiction "made an important contribution to popular acceptance of liberal reform institutions" (*A Hunger for Home* (xiii). However, Glenn Hendler critiques Alcott's faith in liberal reform movements; he argues that "*Work* aims to refigure the sentimental novel's political address to women, to transform sympathetic identification into an interpellation of a liberal feminist subject" (702-3). Taking a slightly different approach, Toby Widdicome believes *Work* is "a remarkable novel because of the degree to which it develops a transcendental philosophy" generally consistent with Emerson's emphasis on individual self-reliance (207-208). Like Widdicome, Mary Rigsby mentions Alcott's connection with transcendentalism, but argues that Alcott instead echoes Margaret Fuller's "feminist

---

early Alcott biographer, Katharine Anthony, describes the novel as "a document in the form of a story" (201, while yet another critic characterizes the novel as "a polemical fiction" (Langland 115). Gregory Eiselein's "Sentimental Discourse and the Bisexual Erotics of *Work*" is an exception to this trend. He believes that the novel is "much more subtle than polemic" (204). Alcott creates a feminist response to antifeminist discourse "by using sentimental discourses to eroticize the representation of women workers and the romantic-erotic possibilities opened up by work" (204).

[19]For an account of Alcott's exposure to transcendental philosophy, see Sandra Harbert Petrulionis' "By the Light of her Mother's Lamp: Woman's Work versus Man's Philosophy in Louisa May Alcott's 'Transcendental Wild Oats.'" Petrulionis reads "Transcendental Wild Oats" as an indictment of masculine visions of utopia that do not offer positive improvements for women's lives (79).

transcendentalism" (109) by "positing social relations as inescapable" (112). According to Rigsby, Alcott's characters "bond with others" and "struggle to achieve freedom *within* the constraints of civilization and domesticity, and, thus, struggle to *remold* them" (112). At the novel's conclusion, then, Christie "commits herself to an American dream based on communitarian rather than capitalistic values" (107). In a similar vein, Elizabeth Langland views the novel as a progression from liberal individualism to community because "independent female exploration of the world culminates in the establishment of a female community" (112).

Though these critics offer quite different readings of related themes, many carve up the novel into two often incompatible sections: the first section reflects the values of liberal individualism as the novel opens with a call for "a new Declaration of Independence" (1) while the second section closes with a "loving league of sisters" (442) that seems to suggest some form of communitarianism.[20] Put another way, the opposition of liberal and communitarian values reflects a division typical of nineteenth-century gender roles in which liberal values such as self-interest are associated with men and communitarian values such as regard for others are associated with women. As a result,

---

[20] For example, Rigsby divides the novel into two parts: the first part recounts Christie's efforts to find fulfilling employment while the second part "works to elaborate a vision of a better society which has as its base a duality, bringing the pattern from the first part of the novel to its most positive expression" (122). Similarly, Hendler marks Christie's suicide attempt as a "transition between the first and second halves of the novel" (693). In the first half, Christie's "individualistic" efforts fail because "they do not result in the sympathetic community she is searching for" (693). Yellin points out that Book One is shaped by Alcott's "economic feminism" while Book Two details her "involvement with utopian collectivism" (528). However, "structural and stylistic breaks" at the end of Book One and Book Two suggest that Alcott "had difficulty dramatizing the successful life of a woman who applied the theories proposed by nineteenth-century social critics" (528). Though the novel "affirms contemporary radical ideas," it also "raises questions about their adequacy, about the adequacy of the sentimental novel as a vehicle for their expression, and about Alcott's adequacy as a writer" (528). Widdicome is one notable exception; however, he sometimes overstates transcendentalism as a unifying theme.

the promise of masculine liberal rhetoric embodied in the Declaration of Independence fails women who must then turn to a community of women, of sisters, for true fulfillment.[21] When critics describe the division between the liberalism of the early part of the novel and the communitarianism that concludes the novel, they tend to overlook the role of contracts throughout the novel. Thus, many critical responses to the novel tend to replicate the type of oppositional thinking that I believe Alcott would have us resist. Throughout the novel, contracts provide Christie with a vision of autonomy, and with each new contractual negotiation, Christie sees a way to start fresh, so to speak.

The first part of the novel calls attention to the employment contract as a reflection of the freedom inherent in the social contract; thus, Christie, like the men in the state of nature, can negotiate and presumably freely choose her obligations to others. Thus, the freedom (and right) to earn and to keep wages from work provides a counterpoint for the loss of freedom incurred within status-based social relationships such as slavery and marriage. Indeed, for many nineteenth-century women's rights advocates, the association of marriage with slavery provided one way to argue for the recognition of rights for women. Elizabeth B. Clark explains that "the slavery/freedom dichotomy helped articulate common apprehensions of the illegitimacy of male and masterly authority, as well as women's genuine outrage at a marital servitude that many felt keenly

---

[21] Alcott's feminism, then, seems compromised when Christie turns to marriage. Emphasizing Alcott's feminism, James D. Wallace directs our attention to absent fathers in Alcott's work and suggests that "her investigation of patriarchy led her to analyze language as a source of power and the differences between masculine and feminine discourses as a measure of gender relations in her nation" (273). However, according to Wallace, "*Work* is frustrating to the modern reader" because the reader never "hear[s] Christie's new voice" when she finally speaks for Women's Rights in the concluding chapters (272). Joyce W. Warren argues that Alcott is "unable to reconcile independence with marriage" so she "solves the problem. . . by killing off the husband of the heroine" (157). As these examples suggest, the feminist themes in the novel echo in a way the liberal/communitarian opposition.

was as degrading as actual bondage" (31). Alcott sets up the opposition of the employment contract and slavery/the marriage contract in the first section of the novel by presenting the employment contract as a way for women to exercise the freedom they will lose upon entering the marriage contract; thus Christie turns to the employment contract rather than the marriage contract as a means to achieve fulfillment. Later in the novel, with Christie's marriage, Alcott inverts this opposition and associates the marriage contract rather than the employment contract with freedom. With this inversion, the relation of marriage to slavery becomes problematic since slavery clearly cannot be associated with freedom, and not surprisingly, at this point the Civil War, previously in the background, directly enters the plot. Indeed, as I will discuss later, the Civil War both initiates as well as severs Christie's marriage contract. What critics who divide the novel into two, often contradictory sections tend to miss is the persistence of contract, in one form or another, throughout the novel. Alcott emphasizes the voluntary element of contract as a means to create just social relationships even as she critiques the notion that contract alone, at least in its classical incarnation, can provide for justice within those relationships.

The first chapter of *Work* reflects Locke's faith in the social contract as a way to provide equitable social relationships based on consent. Indeed, the novel opens with Christie's much-noted prediction for a "new Declaration of Independence" (1), a prediction that certainly calls to mind the 1848 Seneca Falls Convention's call for the extension of full legal rights to women.[22] At the same time, however, the reference to the

[22] In *Law, Gender, and Injustice,* Joan Hoff describes Seneca Falls as "a collective natural-rights vision of equality that called for far more specific individual rights; it was a feminist demand for the long-overdue reconciliation of republican theory with republican practice" (136).

Declaration of Independence calls to mind the patriarchal elements of the social contract that Pateman so aptly critiques. Though Christie claims "I'm not going to sit and wait for any man to give me independence" (8), she still asks her Uncle Enos (who serves as a father figure in this context) if she can "get [her] own living" (2).[23] Enos' response reveals another problem—economic inequality—that social contract theory must overcome in order to provide the freedom it promises. Enos calls attention to Christie's economic position when he points out that she is "poor capital to start a fortin' on" (8). For Uncle Enos, independence must be backed by capital. Though he does provide a "gift"—one hundred dollars—to help Christie, this gift also works an exchange through which Enos justifies teminating his obligation to take care of his niece. Though Christie accepts the money, it later becomes clear that she considered the "gift" a loan when she pays him back as soon as she earns enough money.[24]

Like many nineteenth-century women's rights advocates, Christie sees the employment contract as a way to economic independence and greater self-fulfillment, as the means to implement her idea that the "right" thing to do is to "take care of [her]self"

---

[23] Indeed, Christie's Aunt Betsey suggests that Christie talk to her uncle before going out on her own, and as the above quote indicates, Aunt Betsey supports her husband rather than her niece. Once Enos grants his permission, Aunt Betsey tells Christie, "I ain't no right to keep you, dear, ef you choose to [go]" (3).

[24] Clearly, earning her own money is of major importance to Christie, and economic factors influence her conception of both the employment contract and the marriage contract. The idea of bargaining, typically associated with business deals, employment contracts, and other economic ventures, is linked initially to marriage. Christie believes that Aunt Betsey "made a bad bargain when she exchanged her girlish aspirations for a man whose soul was in his pocket" (8). Christie's description of her first marriage offer reinforces the connection between marriage and economic bargains; Christie explains that "when one well-to-do neighbor laid his acres at her feet, she found it impossible to accept for her life's companion a man whose soul was wrapped up in prize cattle and big turnips" (12). She refuses to view marriage in purely economic terms though she obviously wants to create a better bargain for herself, if not through marriage then through work.

because she "hate[s] to be dependent" (2). Upon leaving home and unable to find other work, Christie accepts a position as a maid with the Stuarts. Mrs. Stuart lays out the terms of the contract: "I wish a capable, intelligent, honest, neat, well-conducted person who knows her place and keeps it. . . .I pay two dollars and a half, allow one afternoon out, one service on Sunday, and no followers" (20). In addition, she wants to call Christie Jane (one of many textual references to Bronte's *Jane Eyre),* and requires Christie's assurance that she will not mind working with Hepsey, the black cook. These conditions hint at the true nature of Christie's duties. Though Mrs. Stuart will not call Christie by her own name, Christie does not initially see that employment contracts, like the conditions of slavery that they seem to oppose, can involve a loss of freedom. Not until Mr. Stuart orders Christie to remove his rubber rain boots and then clean them does Christie realize what it really means to "go out to service" (22). At first, Christie refuses to obey and claims that "it isn't the work; it's the degradation; and I won't submit to it" (22). Christie comes to recognize the double-bind inherent in her employment contract: her contract offers the promise of freedom even as it requires her to perform degrading work. Further, as she gets to know Hepsey, a runaway slave who works to save money to buy her enslaved mother's freedom, she must thus confront slavery, "the greatest of all wrongs" (23). As a former slave who now earns her own wages for her work, Hepsey embodies the idea of freedom associated with the right to make employment contracts. When Christie initially refuses to follow Mr. Stuart's orders, Hepsey reminds Christie, "You's paid for it honey; and if you does it willin', it won't hurt you no more dan washin' de marster's dishes, or sweepin' his rooms" (22). Hepsey's analogy between paid labor and working for the master further suggests links between the two practices.

Indeed, Christie has voluntarily entered an employment contract that demands, under its own terms, a girl who "knows her place and keeps it" (20).

The events surrounding Christie's next employment contract suggest further connections between Christie's position and that of a slave. Despite her experiences with the Stuarts, Christie remains hopeful about her ability to choose her own ends through contract and sets out again, this time "feeling that she had all the world before her where to choose, and that her next step ought to take her up at least one round higher on the ladder she was climbing" (34). Initially, Christie accepts a job as a paid companion, but after problems with her employer, she quits while "resolving not to be a slave to anyone" (34). Christie's resolution suggests that she does not understand fully her own role as a worker. Though her legal position is quite different from that of a slave because she has the freedom to enter contracts of her own choosing and quit a job when she wants to, her economic situation suggests otherwise, as her later experiences vividly illustrate.

Christie's resolve "not to be a slave" seems particularly empty when she must play a role similar to that of a slave at an auction in order to secure her next job as an actress. Reluctant to enter service again, Christie eventually finds work playing the Queen of the Amazons. However, before Mr. Sharp, the manager of the acting company, will offer her a position, he makes her "take a turn across the stage," and as she walks, Mr. Sharp describes her in a manner reminiscent of a slave owner evaluating and then purchasing a slave: "good tread; capital figure; fine eye. She'll make up well, and behave herself" (38). He then makes her an offer: "All right, my dear. Give your name to Mr. Tripp and your mind to the business, and consider yourself engaged" (38). Here, Alcott does not portray Christie actually accepting Sharp's offer, and the absence

of dialogue further reinforces the connection to slavery, especially since Alcott does emphasize voluntary choice when she shows Christie verbally accepting Mrs. Stuart's offer. Once Christie is "regularly engaged, with a salary of thirty dollars a week," it seems as if her troubles are over; however, she has an accident while rescuing a fellow actress from a falling prop.[25] The support Christie receives from her co-workers suggests that she becomes a member of a community: "these men and women give as freely as they spend, wear warm, true hearts under their motley, and make misfortune only another link in the bond of good-fellowship which binds them loyally together" (57). Here, Christie experiences a different kind of bond; though all the actors come together as a result of their employment contracts, they do not have formal contractual ties to each other. Instead, they are drawn together by an informal "bond." However, despite the feeling of community Christie experiences, she eventually decides that acting is no longer a viable career because it leads to "self-injury" and "self-reproach" (58).

Alcott's presentation of Christie's next job as a governess for the Saltonstalls connects the employment contract and the marriage contract so as to complicate further the notion that the "right to work for wages" represents " a cardinal tenet of freedom" (Stanley 473).[26] Mrs. Saltonstall's brother, Phillip Fletcher, eventually falls in love with

---

[25] Mr. Sharp describes Christie's actions in peculiarly legalistic terms: "the generous act which perhaps had changed the comedy to a tragedy and robbed the beneficiary of her well-earned reward at their hands" (54).

[26] The exchange between Christie and Mrs. Saltonstall provides a clearer example of a contract—both the offer and the acceptance—than any other of Christie's contracts thus far. Unlike Mr. Sharp, Mrs. Saltonstall actually explains the requirements and asks for Christie's assent: "I wish someone to teach the children a little. . . .Do you feel inclined to try the place? And what compensation do you require?" (60). Christie also plays a more active role because she asks for a "reasonable sum," though that sum in actuality is much cheaper than what other applicants have suggested (60). Mrs. Saltonstall finds the "terms. . .quite satisfactory" and hires Christie without knowledge that Christie was once an actress.

Christie, and here, Alcott draws on the plot of Charlotte Bronte's *Jane Eyre*.[27] When Phillip asks what she thinks about Rochester, Christie replies, "I like Jane, but never can forgive her marrying that man" (80), and when pressed claims that Jane's marriage is not a "fair bargain" (81). Christie's language again highlights the economic element of the marriage contract, and in this situation, an ethical claim is intertwined as well: "If he [Rochester] has wasted his life he must take the consequences, and be content with pity and indifference, instead of respect and love" (81). Fletcher's rationale for proposing to Christie also suggests the economic dimension of marriage; he believes that his "fortune" would "pay" for whatever time Christie gives to the marriage and that his death would "leave her a bonny widow" 76). Fletcher explains further:

> He wanted her as he had wanted many other things in his life, and had little doubt that he could have her for the asking. Even if love was not abounding, surely his fortune, which hitherto had procured him all he wished (except health and happiness) could buy him a wife, when his friends made better bargains every day. (79-80)

Through the course of this exchange, the opposition of the marriage contract and the employment contract completely breaks down. Rather than asking Christie to be his wife, Phillip instead wants her to be his "governess" and claims, "how glad I should be to give all that I have if I might keep you always to make my hard life happy" (82).

Though both Christie and Mrs. Saltonstall seem to act more or less freely despite Christie's omission, Mrs. Saltonstall does point out that her decision is contingent upon her brother's consent to the arrangement. Similarly, this scene also calls attention to patriarchal inheritance practices. When Christie meets her charges--the "heir," who happens to share his full name with his father, and the "little lady" (60)--, she wonders if "the possession of names nearly as long as themselves was not a burden to the poor dears" (61).

However, Christie takes an active role in this particular contract negotiation. She sees the matter differently than Phillip does and, perhaps drawing on her earlier experience with employment contracts, requests a more specific explanation of his terms; she asks, "what can you give me but money and position in return for youth and freedom?" (87). Christie clearly understands that marriage involves the exchange of her freedom for something else. Then, again assuming an active role, she answers for him: "Not love, for you count the cost of your bargain as no true lover could" (87). Eventually, she declines his offer because answering "'yes' would promise far more than she could give" (82). Christie seems proud of her decision when she says to herself, "I haven't sold my liberty for the Fletcher diamonds" (89). For Christie, the marriage contract should create an ethical connection predicated on love, not economic security or gain. However, Christie does lose her job when Mrs. Saltonstall finds out that Christie has been an actress and that Phillip had proposed.

In Christie's next situation, justice itself is at issue. When Mrs. Tudor "offer[s] her the place of companion to an invalid girl [her daughter Helen], where the duties were light and the compensation large" (92), Christie immediately accepts the position. Christie's "attempt at companionship" creates a sense in her of "interest and goodwill, for this was work in which the heart took part, as well as head and hand" (102-3). For Christie, Helen's "hard lot" and "dark experience. . .gave her the right to utter the bare truth" (110). All the Carrol siblings except Bella, who does not know about the family's history of madness, agree not to marry or to have children. According to Christie, the

---

[27] Indeed, Christie apparently reads *Jane Eyre*--the book "lay on her knee" during one conversation with Phillip (80). For an in-depth account of connections between Bronte and Alcott, see *Louisa May Alcott and Charlotte Bronte: Transatlantic Translations* by Christine Doyle.

only "just" action is to "tell Bella all the truth, and help her to refuse her lover. Do this just thing, and God will strengthen you to bear the consequences" (116). Before she leaves the Carrols, Christie tells Bella to "give up her lover" (124), and Bella agrees, claiming "it is right" (124). When Helen eventually commits suicide and dies in her mother's arms, Christie does leave the Carrols. Though she "refused to take one penny more than the sum agreed upon," Christie receives extra money, a gift of sorts from Harry (127).

Harry's gift enables Christie to purchase, both symbolically and literally, freedom. First, she satisfies what could be considered a legal obligation by repaying Uncle Enos for what she considered his "loan" of one hundred dollars. Next, she literally purchases the legal freedom of a person when she sends "another hundred" to Hepsey who "had ventured South and tried to buy her mother" (127). Though Hepsey is reluctant "to take so much from a fellow worker," Christie insists, claiming "I'd give it if it was my last penny, for I can help in no other way; and if I need money, I can always earn it" (127-28). Christie sees this gift as an "investment" that "would be blessed, since shares in the Underground Railroad pay splendid dividends that never fail" (128). However, despite Hepsey's efforts, "'old missis' would not let her [Hepsey's mother] go at any price, and the faithful chattel would not run away" (127), so Hepsey instead "liberated several brothers and sent them triumphantly to Canada" (127). Christie's final gift suggests a loss of freedom. Another portion of the money goes to purchase wedding presents for Lucy who then "went west to follow the fortunes of her lord" (128). Interestingly, the news of Lucy's wedding is juxtaposed to the breakup of the community of actors: "the old theatre was to be demolished and the company scattered" (128). This

scene exposes the economic issues that complicate the association of the right to earn wages with freedom. Indeed, a gift from a patriarchal figure facilitates all of these economic exchanges.

Christie's next two positions, first as a seamstress for Mrs. Cotton and then as a self-employed seamstress, further complicate the idea that employment contracts represent true freedom. Indeed, these sections are among the most legalistic scenes in the entire novel and directly raise questions about the justice of relationships created through contract.

Alcott does not provide the terms of Christie's employment by Mrs. King, and instead the scene directs our attention again to justice itself. Just as Christie makes a new friend, Rachel, Mrs. Cotton learns that Rachel is not the "respectable and worthy girl" she seems to be and brings charges against Rachel to Mrs. King (135). The result is a bizarre trial during which Rachel appears as "a meek culprit at the stern bar of justice, where women try a sister woman" (134). In this scene, Christie becomes a kind of defense attorney with Miss Cotton as the prosecutor who brings the charges and Mrs. King as the judge. Christie defends Rachel, first by attempting to discredit Miss Cotton by pointing out that "her jealousy [may] make her unjust" (135) and then, when she learns the accusations are true, simply by asking Mrs. King to "forgive" Rachel (137). Mrs. King initially objects, primarily on economic grounds, that "it would be the ruin of my establishment; not a girl would remain, and the character of my rooms would be lost forever" (137). Christie persistently defends Rachel and asks "Where will she go if you send her away? Who will employ her if you inform against her? . . . Think of your own

daughters and be a mother to this poor girl for their sake" (137). This last plea to family ties seems to sway Mrs. King as "pity was about to win the day" (137).

However, economic considerations outweigh the appeal to family-like ties between employer and employee. In the end, it is Miss Cotton who "turned the scale" (137) by threatening to leave if Rachel stays. The image of the scale ties Miss Cotton to both the scale of justice and the more literal scale that weighs cotton bales to determine their economic worth. Indeed, Miss Cotton's threat forces Mrs. King to realize that "to lose Cotton was to lose her right hand, and charity at that price was too expensive a luxury to be indulged in" (138). Thus, "self interest [gets] the better of sympathy in Mrs. King's worldly mind," and she concludes that "time is money here and we are wasting it" (138). As representatives of the "bar of justice," both Mrs. King and Miss Cotton have quite significant names. The name King invokes the line of patriarchal descent and inherited power that Locke's ideas about the social contract were designed to counter. At the same time, Miss Cotton's name invokes images of the Lockean social contract at its breaking point as the United States is on the verge of Civil War due to slavery and its economic impact. Cotton's name recalls the slave labor existing in spite of the Declaration of Independence.

After Christie leaves in protest of Rachel's dismissal, she must find other employment. The association of the employment contract with freedom then completely breaks down when Christie becomes a self-employed seamstress, arguably a situation that should offer the most individual freedom because Christie owns herself. She works hard to "buy a little happiness for herself by giving a part of her earning to those whose needs money could supply" and refuses to "give up" the "liberty" of her own, private "little

room" (148). After a brief illness, "unpaid debts" force Christie to take on even more work, and Mrs. Flint, "a woman who dunned her debtors relentlessly" (151), even accuses Christie of running away to avoid paying her rent. Christie hopes a client will pay her enough to cover her debt to Mrs. Flint; however, her client refuses to pay for her work even though she "promised" that Christie would "be well paid" for her labor (154). Though another servant warns Christie that her employer always "put[s]. . .off" other workers and even "beats 'em down into the bargain" (153-54), Christie performs her obligations to her own detriment. As Christie puts it, "I'll keep my promise, and I hope she will keep hers" (154). Turning to the courts for some resolution is an option never explored. Unfortunately, keeping her word does not benefit Christie, and she is then unable to find other employment.

Christie's despair only increases when she accidentally witnesses a wedding, and "the sharpness of the contrast between the other woman's fate and her own" causes her to question her fate: "It isn't fair, it isn't right, that she should have so much and I so little! What have I ever done to be so desolate and miserable, and never find any happiness, however hard I try to do what seems my duty?" (158). The sense of injustice building since Rachel's trial scene culminates here as Christie realizes that economic inequality makes justice difficult, if not impossible, to attain. She contemplates suicide as Helen Carrol did. When Rachel reappears and saves Christie, Christie explains her actions away: "I worked too hard; I'm not myself to-night. I owe money" (160).

Many critics point to the suicide scene as a turning point in the novel that marks the shift from liberal to communitarian values. On one level, this certainly seems an accurate reading. For instance, when Rachel sends Christie to Mrs. Wilkins, who had

helped Rachel in a similar situation, Christie immediately feels drawn by the love in the Wilkins' household. However, love continues to be expressed in contractual terms. Christie wants to stay and immediately makes Mrs. Wilkins an offer of sorts: "I am ready to go to work to-morrow, and will do any thing I can find, but I *should* love to stay here a little while, if I could; I do so dread to be alone. Is it possible? I mean to pay my board of course, and help you besides if you let me" (173). Mrs. Wilkins, in response, emphasizes Christie's well-being while remaining attentive to conditions of the exchange: "you can take out your board in tendin' baby and putterin' over them little tykes" (174). Described as an exchange, the agreement enables Christie to feel as if she deserves to stay because she will be earning her keep. Mrs. Wilkins also points out that she will not be doing Christie a "favor" and, indeed, that Christie will be the one performing "a puffect charity" (174). Christie seems happy with this arrangement as she "loved to pay her debts in something besides money" (200).

Christie suggests that justice can be predicated on social relationships that are not bound up with economic issues. With the reverend Parker's help, Christie goes to work for the Sterlings—a Quaker woman and her son David—and soon finds that the "country air [is] . . . worth more to her than money" (216). This arrangement creates a family-like situation as "mistress and maid soon felt like mother and daughter, and Christie often said she did not care for any other wages" (245).[28] David asks Christie to play Portia—one of David's favorite Shakespearean characters—but Christie refuses and claims that she is "not a judicial woman" (273). During the same conversation with David, they discuss

[28] Indeed, on Christie's birthday, Mrs. Sterling wakes her with "a happy birthday, and God bless thee, my daughter" (257). Yet, Christie's relationship with David soon complicates things.

justice at some length. Christie quotes an unidentified person who argues that "'companionship teaches men and women to know, judge, and treat one another justly'" (268).

Indeed, initially Christie and David cultivate a brother-sister relationship, and Alcott describes their relationship with contractual language, which suggests that companionship can provide an alternative model for contractual relationships. Christie urges David to "Forget that I am a woman and tell me as freely as if I was a younger brother" (269). Though David remains reluctant to talk to Christie about his past, he does offer her the right to ask him "anything" (278). Interestingly, Christie chides him for making a "rash promise" and points out that as "a woman and therefore curious," she may "take advantage of the privilege" (278). David only suggests that she "try and see," and by the end of the conversation, they are, according to Christie, "friends forever" (283). She speaks to him as "a woman speaking to a brother," and David, "as if to seal the bargain, . . . gravely kissed her on the forehead" (283).

Not surprisingly, this brother-sister bargain becomes problematic when Christie falls in love with David. [29] However, Christie's ethics compel her to honor the agreement. She tells herself, "David's heart is in Letty's grave, and he cares for me only as a friend. I promised to be one to him, and I'll keep my word like an honest woman" (289). Both David and Christie want to be able to consider themselves just. For Christie keeping her word "like an honest woman" is so important that she breaks her mother-daughter bond

[29] Christie characterizes her earlier dismissal of David as a possible suitor as an "injustice" (286).

with Mrs. Sterling, who had always treated her "motherly kind" (301).[30] Later, after Christie leaves the Sterlings to work for Mr. Power, her promise to David again influences her actions. When Phillip Fletcher reappears and proposes marriage, Christie recalls her "compact" and wonders how she could "be his [David's] friend if she was Mr. Fletcher's wife" (333). As she contemplates the offer, she considers "whether she would not be selling her liberty too cheaply if in return she got only dependence and bondage along with fortune and a home" (324). Though she is tempted "to pride in her power over one man, because another did not own it" (317), in the end "David's friendship was dearer than Phillip's love" (333).

David characterizes love in more legalistic terms. He believes that after turning his back on his sister Letty, he has "no right to hope or ask for any woman's love" until he becomes "worthier of it" (287). Here, one must become worthy to earn the "right" to ask for love. David's promise to himself keeps him from expressing his love for Christie; as he later explains, "I had made a sort of vow that I'd never love or marry as punishment for my cruelty to Letty" (351). Thus, when he finally confesses his love, he feels like " a man out of prison" who "*must* enjoy his liberty in some way" (357, emphasis in original).

However, David's "liberty" is short-lived as the Civil War represents a "reckoning day of eternal justice" (359). The social contract itself theoretically creates the conditions for just social relationships. With the war, then, comes an increased awareness of rights. As Mrs. Wilkins puts it, "no one has a right to be comfortable at a time like this" (368). David and Christie promise "to do [their] best, and live or die for it,

---

[30] Mrs. Sterling reminds Christie of their friendship and tells her to "go in peace with an old friend's thanks, and good wishes in return for faithful service, which no money can repay" (301). Mrs. Sterling's

as God wills," and when the war starts, both are "called upon to keep their promise" (358). For David, this means doing his part "like a man" in order "to see this great wrong righted" (360). At the same time, Christie realizes that she has "no right to keep him" (359).

The threat to the social contract actually leads to their marriage. Only when faced with the war does Christie agree to marry on the condition that David will allow her to enlist as a nurse. As Christie tells him, "you *will* let me do it and in return I will marry you whenever you ask me" (363). Much like David's actions when he seals their brother-sister bargain with a kiss, Christie "seal[s] the promise with a kiss that silenced him" (363). David invokes her promise when he finally proposes. As he presents her with a marriage license and a ring, he tells Christie to "keep [her] promise" (374). David's concerns about the marriage also link marriage to the social contract; he wants to be sure that "no doubt, no fear . . . mar[s] [her] consent" (375).

The defense of the social contract both compels their marriage and precipitates its end. Only after the war breaks out over the fate of the Union does Christie finally agree to marry David, and the war finally severs their union. David receives a fatal wound when he tries to help several women and children who are escaped slaves. Christie reminds herself of her marriage vows: "this was the worse, and till death came she must keep faithfully the promise made with such a happy heart" (404). For Christie, David's impending death represents an injustice, and she questions his decision to help the fleeing slaves: "it is not just that you should suffer this for a creature whose whole life is not

---

remarks suggest that true relationships cannot be characterized in economic terms.

worth a day of your brave, useful, precious one! Why did you pay such a price for that girl's liberty?" (405). Though David argues that he "owed" his life (405), the valuation of a life haunts Christie long after his death. To her, many of the men who survived the war seem "useless" (410), and a sense of great injustice persists. At one point she argues with herself: "Oh, it is not just! I cannot forgive God for robbing him [David] of all his honors, and me of all my happiness" (410). When Mr. Power reminds her that God rewards David for sacrificing his life, "Christie could not be content with this invisible intangible recompense for her hero: she wanted to see, to know beyond a doubt that justice had been done . . ." (411).

Her pregnancy, " a surer confirmation of her hope than subtle argument or sacred promise" (412), consoles her somewhat, and after her daughter's birth, she focuses all her attention on the "fatherless child" (414). Christie remembers the financial constraints of her time as a wage worker, so her "sole ambition" becomes creating "a little sum put away for baby, safe from all risk, ready to draw from as the need came and sacredly devoted to this end" (416).

This "little sum" comes via a bequest from Christie's Uncle Enos, a man who does not know how to relate to her daughter Ruth, and it is "as if he had not bargained for her presence" (417). Enos also does not understand Christie's relationship with Mrs. Sterling, Letty, and the other women in her life. When Enos asks Christie if they have money to live on, Christie explains that she gives Letty and Mrs. Sterling "two-thirds" of everything she earns (419). For Enos, this arrangement is not "a fair bargain" since Christie does "all the work" (419). However, as Christie puts it, "We don't make

bargains, sir: we work for one another and share everything together" (419).[31] Enos sees this arrangement as "so like women," and in contrast, he wants "to see that 'the property was fixed up square'" (419). Though Christie's situation reflects, as several critics point out, communitarian values since the women "share everything together," the operation of law, of a patriarchal bequest, alleviates her concerns about Ruth's future as well as secures her own future with Letty and Mrs. Sterling. Indeed, a deathbed bargain of sorts leads to this bequest because Enos "promised" his dying wife that he would do something charitable with his money before he died (421). When Enos leaves all his property to Christie, she does not keep anything for herself; instead, "a good portion was put by for Ruth, something for 'mother and Letty' that want might never touch them, and the rest she kept for David's work, believing that, so spent, the money might be blest" (423).

With this bequest securing her family's future, Christie turns her attention to the issues, primarily economic, confronting working women everywhere. She attends meetings during which "the workers poured out their wrongs and hardships, . . . demanding or imploring justice, sympathy, and help" (425). However, the meetings often reflect a divide between the working women and well-educated speakers and the upper-class women who want to help. Indeed, the speakers offer several approaches, none of which seems completely viable to Christie. One speaker advocates a "time when all would work harmoniously together in an Ideal Republic, where each did the task she liked, and was paid for it in liberty, equality, and fraternity" (426). However, the workers cannot see any connection between theory and practice as they "don't see how it's going to better wages among us *now*" (426, emphasis in original). Another speaker emphasizes

[31] However, Christie never claims that the women do make contracts.

political reform, "which fired the revolutionary blood in their veins, and made them eager to rush to the State-house, en-masse, and demand the ballot" (426). The last speaker points to statistics about "needle-women who had starved, gone mad, or committed suicide during the past year; [and] the enormous profits wrung by capitalists from the blood and muscles of their employees" (427). After hearing all these approaches to the problems, Christie feels "a strong desire to bring the helpers and the helped into truer relations with each other" and presents her own impromptu speech to the audience (427). Rather than telling what Christie says, Alcott's narration instead renders Christie's effect on her audience. According to her listeners, Christie offers "not pity as an alms, but justice as a right" (429).

Given the commentary on justice that runs throughout the novel, just what does Christie's offer of "justice as a right" mean? Clearly, economic reform represents a necessary step toward true equality, and the right to work for wages, to enter employment contracts, does not, in and of itself, secure freedom. Perhaps Christie is "not a judicial woman" because she recognizes that justice requires more than merely ordering competing claims according to economic issues—as Mrs. King does when she privileges an economic justification for Rachel's dismissal over Christie's appeal to a sense of duty toward others. The novel's last scene shows Christie as a part of "a loving league of sisters, old and young, black and white, rich and poor," and she tells her friends that she has "found independence, education, happiness, and religion" (442).[32] According to Mrs.

[32] One clue comes from Bella Carrol's reappearance near the novel's conclusion. In the only male-female relationship remaining intact at the end of the novel, Bella and Harry, brother and sister, create a marriage of sorts. As Bella explains it, "we shall always be together, and all in all to one another, for we can never marry and have homes apart you know" (432). Yet Bella is somewhat dissatisfied by her role; Harry "has his work" while she has "nothing after [her] duty to him is done" (433). Christie suggests that she educate

Wilkins, it is now Christie's "duty" "to help other folks into the same blessed state" (442), and Christie "accept[s] the task" (442). Her response suggests the acceptance of an offer, and thus a contractual vocabulary describes relationships to others without also inscribing an economic valuation for the exchange. The description of Ruth's reaction reinforces the idea that contracts can create more than economic relationships. Ruth chimes in with "me too," and her response represents "a hopeful omen, seeming to promise that the coming generation of women will not only receive but deserve their liberty, by learning that the greatest of God's gifts to us is the privilege of sharing his great work" (443). The last line suggests a sense of justice between generations as well as justice here and now, and the idea that a child, Ruth, embodies the promise to future generations calls to mind two other scenes in which children comment on justice.[33]

While Christie works for the Carrols, she learns that children can judge their parents. Breaking a law is a central issue in this scene: "when the past seemed buried, the ghost which haunted it returned, for the punishment of a broken law is as inevitable as death" (105). The broken law apparently forbids marriage and having children when those children can inherit the "curse of insanity" (108). As Helen Carrol explains it, "we come of a mad race, and for years we have gone recklessly on bequeathing this awful inheritance to our descendants" (108). Helen "hates" her mother for marrying her father "after being warned that, though he might escape, his children were sure to inherit the

---

her own class rather than "go down in the sloughs with alms for the poor" because "so much pity and money are wasted in sentimental charity" (435).

[33] Brook Thomas briefly discusses the problem of justice between generations in the final chapter of *American Literary Realism and the Failed Promise of Contract*. Discussing Edna Pontellier's relationship with her children in *The Awakening,* Thomas notes that the novel "points to the limits of the ability of even

curse" (109).[34] The inheritance creates in the children the right to judge their parents; Helen argues that "there comes a time when children judge their parents as men and women, in spite of filial duty, and woe to those whose actions change affection and respect to hatred and contempt" (110).

Elizabeth Keyser argues that Alcott's texts often include theatrical performances that comment on the text in which they appear (xv). The Wilkins children act out a scene that comments upon the representation of the social contract and its claim to secure justice.[35] Christie reads about Noah's Ark, a story about literally securing life for future generations. Unfortunately for Christie, the story gives the children the idea to act out the scene, and she leaves "the rebels to their own devices" until "mutiny" breaks out on the ark. Throughout the scene, the children are described in terms likening them to the colonial rebels who left England and started a new nation. For instance, the playful children "set all law and order at defiance," and Christie reads the story to begin with in an effort to "quell the insurrection" (178). The male children are named after significant historical figures—George Washington, Daniel Webster, and Andrew Jackson—and during the staged mutiny, "Andrew threatened to 'chuck' Daniel overboard if he continued to trample on fraternal toes, and in the midst of the fray, by some unguarded motion, Washington capsized the ship and precipitated the patriarchal family into the

---

a reconstructed sense of the promise of contract to deal with an older generation's duties to a younger one" (295).

[34] As Elizabeth Keyser points out, "by making the curse in Helen's family patrilineal rather than matrilineal as in Sybil's (and Bertha's), Alcott directly associates female madness with patriarchy" (107).

[35] In *The Promise of Destiny*, Joy Marsella argues that children in Alcott's fiction "often stand in judgement of what they perceive to be the failures of the adults in their lives" (75).

bosom of the deep" (180). With the fraternal brotherhood in chaos, the ark sinks and with it the "patriarchal family."

The children also act out a mock trial, again as important historical figures, with Christie as "judge" (182). The trial begins with a general statement of the facts: "Wash, sighing for the enlightenment of his race, proposed to make a bonfire, and did so with an old book; but Gusty, with a firm belief in future punishment, tried to save it, and fell a victim to her principles, as the virtuous are very apt to do" (181). The book is introduced into evidence before the "court" along with paper dolls which include a hat labeled "'The Bay of Biscay, O" and "'Chevy Chase' issuing from the mouth of a triangular gentlemen" (182). In addition to historical figures, several paper dolls "branded here and there with large letters, like galley slaves, were produced by the accused" (182). Both historical figures and galley slaves provide evidence, and George Washington appears to be accused of committing a crime when he burns a book in order to enlighten his race.[36] Though Alcott does not identify the "old book," one likely candidate is the Bible, especially since Christie was reading Bible stories in the preceding scene. The Bible also seems a likely choice since social contract theory initially replaced Filmer's biblical justification for monarchical authority; thus, in order to participate in founding a new nation based on a declaration of independence, Washington must eliminate evidence that the king's authority is analogous to Adam's paternal authority and thus represents a natural hierarchy for social relationships. Yet the social contract cannot be considered apart from the "galley slaves" who exist within its definitions of freedom.

---

[36] In an earlier scene, Christie almost burns a house down when she falls asleep while reading and does not blow out her candle.

As both the Ark scene and Washington's trial suggest, the novel indicates a more radical trajectory than previous critics have suggested; Alcott can only make way for the new Declaration of Independence promised at the beginning of the novel and the promise to future generations implied at the conclusion by drowning both her forefathers and the patriarchal family, or, at the very least, trying those forefathers for their wrongs according to the terms of their own contract.

A Modern Mephistopheles: Art as the Object of Contract

In this complicated novel that centers on a Faustian contract and a series of subsequent agreements, Alcott asks us to contemplate art itself as the object of a contract. Alcott borrows from Goethe's *Faust* to create a tale about a struggling writer, Felix Canaris, who enters a series of contracts with another, much superior writer, Jasper Helwyze, initially for Helwyze's help with his career and eventually for the use of Helwyze's poetry. In the novel's opening scene, Helwyze makes Canaris an offer when he discovers Canaris on the brink of suicide as he burns a rejected manuscript. Helwyze states: "You shall give me a year of your liberty, and I will help you prove Forsythe [the editor who rejected Canaris' manuscript] a liar" (17). Canaris immediately accepts: "Give me this and I am yours, body and soul" (17). According to this bargain, Helwyze merely provides his support. However, the arrangement changes when Canaris later asks Helwyze for permission to use Helwyze's work as his own, and they enter a second agreement. Canaris explains that

> It happened in that second month, when I promised to stay; he to help me with my book. It [the poetry] was all mine then; but when we came to

> look at it, there was not enough to fill even the most modest volume; for I had burnt many, and must recall them, or write more. I tried honestly, but the power was not in me, and I fell into despair again. (259)

Out of this despair, Canaris asks Helwyze for more help when he finds Helwyze's poems: "You do not care for fame, and throw these away as worthless: I long for it, and see more power in these than in any I can hope to write for years, perhaps; let me add them to mine, and see what will come of it" (260). Helwyze agrees to the plan but reminds Canaris that Canaris must "take the consequences" for the decision (260). In exchange for the poetry, Helwyze would be able to "live his youth over again" in Canaris who would also "be a son to him" (261).

As a part of their bargain, Helwyze later forces Canaris to marry Gladys, a young orphan who falls in love with Canaris. At first, Canaris objects because he loves Olivia, an older woman who once had an affair with Helwyze, and he does not want to lie to Gladys. Helwyze, who is attracted to Gladys himself, offers Canaris a way out of their bargain. As Helwyze explains, "I shall miss my congenial comrade, but I will not keep him if he feels my friendship slavery. I release you from all promises" (84). However, Helwyze adds a stipulation: "In return for your liberty I claim the right to use mine as I will" (84). For Helwyze, this means that he will marry Gladys himself. However, Canaris, driven by jealousy, agrees to marry Gladys and pledges to tell her the truth about everything. When they find some happiness together, Helwyze calls in a favor from Olivia and asks her seduce Canaris. Through this tangled web of contractual relationships, Alcott asks us to consider what it means to own a work of art: Is ownership

synonymous with legal title, or does it suggest something more? Can art exist apart from and prior to its entry into the market?[37]

As Alcott's problems with copyright issues suggest, art becomes exchangeable as property in the marketplace through copyright law; indeed, copyright creates legal title to a work of art in much the same way that a deed creates an ownership interest in a piece of real property. Copyright thus converts art into property, and Helwyze and Canaris' contract replicates this process. One side of their exchange is obvious; as a result of their contract, Canaris receives the legal right to do what he wishes with Helwyze's manuscripts. Indeed, it is no longer legally accurate to describe the manuscripts as "Helwyze's manuscripts" because he voluntarily relinquishes his property rights in those

---

[37] The original agreement seems deceptively simple, and many critics draw on parallels to Goethe's *Faust* to understand Alcott's work. For instance, Ruth K. MacDonald points out that "like Goethe's Mephisto, Helwyze offers his victim worldly comforts and acclaim in return for his soul, in this case Canaris's art" (90). However, MacDonald also notes that Alcott modernizes her version by rewriting Goethe's Gretchen as the innocent Gladys and "thereby focuses on the 'Woman-Soul,' what she [Alcott] saw as the real power of women to guide and save men" though keeping their "soul[s] pure and above reproach, as Gladys does" (92). Mary Chapman takes a different approach; although Chapman also reads the novel as a commentary on art and focuses on Gladys' role, she argues that womanly influence makes women the objects of art rather than artists themselves, and, as a result, "Gladys achieves influence over her dissolute husband not through the passive exercise of womanly influence, but by seizing the manipulative visual powers of the gaze practiced by Helwyze" (24). However, Chapman does admit that Gladys' death "suggests a particularly bleak fate for women artists" even though she does avoid becoming an object (35). Thus, in the end, Alcott offers "the reborn Canaris as representative of a new generation of artist who will embrace an androgynous model of artistry, where creativity is never compromised because of gender" (35). Rena Sanderson and Mary Kane read the novel as an allegory of Alcott's own struggle to find an artistic identity. For Sanderson, the novel is a "*kunstlerroman* that takes as its subject matter the doubleness of subversive and conformist creativity, the very doubleness that dominated her own life and career" (41). Ultimately, "the book reinscribes conflicts of creativity as conflicts of gender and sexual politics, calling into question masculine definitions of artistic productivity and offering a tentative feminist alternative" (42) in what Sanderson calls "reformist" writing, embodied by Gladys, that allows Alcott "to transform the dishonesty of her moral writings and the transgression of her sensational writings into legitimate productivity" (52). Rather than focusing solely on Gladys, Kane argues that each character represents a part of Alcott's "artistic identity" (109) and that the novel reflects the "artist's attempt to reconcile the disparate parts of her fragmented artistic identity" (112). According to Kane, Alcott identifies most strongly with Helwyze because they share the "common choice of anonymity" (117). However, for both Alcott and Helwyze, anonymity leads to fragmentation of "identity into a public image and private reality," and whatever "success that comes from trading away one's own identity, either as an artist or as a woman, is ultimately the worst possible failure" (118).

manuscripts in exchange for Canaris' "liberty." Helwyze describes the contract to Olivia in economic terms: "money can buy almost anything, you know; so I bought my handsome Alcibiades, and an excellent bargain I find him" (38). The money that bought Canaris is Helwyze's art, commodified in terms of its economic value when Canaris publishes Helwyze's (now Canaris') work.

When we look at the arrangement from Canaris' side, the loss of liberty seems paramount even though, initially, Canaris describes the contract in positive terms: "For more than a year I have been with him, --first as secretary, then as protégé, now friend, almost son; for he asks nothing of me except such services as I love to render, and gives me every aid towards winning my way" (28). Canaris learns just what he has bargained away when Helwyze orders him to marry Gladys even though Canaris loves Olivia. When Canaris argues that he "will not give up" his "liberty so soon," Helwyze reminds him of the terms of their contract: "I thought you had already given it up. If you choose to annul the agreement, . . .you know the forfeit" (51). Helwyze also points out that the "bond" requires "entire obedience in exchange for the success you coveted" (51). As if the terms of the contract itself were not enough, Helwyze also plays on their father-son relationship when he suggests that he "ask[s] no more than many parents do" (52).

Canaris' next defense highlights their respective bargaining positions when they entered the agreement. He argues that his dire economic situation rendered them unequal in a way that contract cannot adequately remedy. According to Canaris, "a starving man does not stop to weigh words or haggle about promises" (52). Helwyze refuses to give in and draws a distinction between their initial contract and the subsequent contract in which they agreed that Canaris could publish Helwyze's poetry under his name.

Helwyze tells Canaris: "You freely entered into it, reaped the benefits of it, and now wish to escape the consequences of your own act" (52). Carnaris can only claim that he never imagined that Helwyze "would exact such obedience as this" (53). He finally consents to the marriage out of "the obedience of a son" (77), and in an image reminiscent of their initial bargain, Canaris shakes Helwyze's hand "as he had done when selling his liberty, for now he was selling his love" (77).

While "liberty" is certainly important, another element of Carnaris' part of the exchange is not so obvious. Canaris' art, inferior though it may be, also indirectly becomes an object of the contract because Canaris decides not to develop his own talent. Even more significant, art is also the object of a series of exchanges, including the marriage contract, involving Gladys. Like Helwyze and Canaris, Gladys is also an artist. When she finds a "costly" string of pearls in her basket, she believes they are a gift from Canaris. However, Canaris quickly points out that Helwyze gave her the pearls: "Your singing pleases him, and he pays you so" (91). Gladys refuses to accept the pearls, claiming "I will earn my just due, but not be overpaid" (91). Since she rejects Helwyze, Gladys becomes more attractive to Canaris, who finally proposes not because the contract with Helwyze requires his obedience but because he wants "to make his own the thing another seemed to covet" (91). Though she refuses to reduce her art to its exchange value by accepting the pearls, she becomes a "thing" like a work of art to Canaris, a thing he will own after their marriage. The marriage would also increase the market value of Canaris' work because, according to Helwyze, it would "stimulate public interest" (117).

After her marriage, Gladys leads a "double life" because her marriage contract involves not only duties to Canaris but by extension to Helwyze as well (122). While

Canaris works, Gladys studies with Helwyze and often spends hours reading with him in his library; indeed, she "devoted herself to Helwyze with a faithfulness which surprised him and satisfied her; for, as she said, her 'bread tasted bitter if she did not earn it'" (120). Soon, her "heart and mind were divided between the two. . . .To the younger man she was a teacher, to the elder a pupil; in the one world she ruled, in the other served" (123). Helwyze, though, plays on their intellectual connection when he buys her several books. However, after the incident with the pearls, Helwyze does not give her the books. As he explains it, "you shall pay for them in your own coin, so there need be no sense of obligation. Rest satisfied I shall get the best of the bargain" (111). Thus, books are the object of an exchange in yet another contract involving art, and here Alcott calls our attention to art as a commodity. Her relationship with Helwyze also suggests that she is the object of an exchange as well. For instance, Helwyze sometimes makes her uncomfortable when he reads poetry to her because the characters' names "suggested a sultan and his slave, and she did not like either the idea or the expression with which Helwyze regarded her" (128). Interestingly, though Helwyze emphasizes that Gladys can pay for the books, he also figures her as a slave who does not earn wages.

The commodification of art is also apparent in the only scene in which Canaris appears at his desk; indeed, he is "sitting at his escritoire. . .with a strew of gold and notes before him, which he affected to be counting busily" (155). Though Canaris busies himself with the money because Gladys discovered him doing nothing, the scene reinforces the connection between money and art. Canaris confesses that he earned the money through gambling in an effort to achieve financial independence. Gladys, in turn, refuses to accept the money because he has not "earned" it (158). According to Gladys,

"there is always enough in the little drawer" to satisfy her needs (158). However, Canaris' response suggests that the money in the drawer is what she earns as Helwyze's companion rather than what Canaris earns as an artist. Canaris urges her to "say, rather, the salary which you earn and I spend" (158). Interestingly, Gladys points out that, as Helwyze claims, "even the best poetry is not profitable except in fame" and that to earn more money, Canaris could work on the "translation" of a rare Spanish book (164). As she explains it, "that will bring you something, as it is rare and old; and you, that have half a dozen languages at your tongue's end, can easily find plenty of such work" (164). What is most interesting about her suggestion is that as a translator, Canaris must operate at the boundary between authorship and ownership, and indeed may transgress or even eliminate that boundary altogether.

Copyright law seems important here because while it can certainly protect the author's economic interests, it can also create a distinct boundary between author and owner and thus sever ownership from authorship. In a fascinating scene that illustrates the porousness of that boundary, Helwyze, Canaris, and Gladys all contribute to a text in process. After working "like a galley slave" (138)—an expression echoing Alcott's own experiences as writer—for three months on his own manuscript, Canaris' frustration mounts, and he again contemplates tossing his manuscript into a "bonfire" (143). This time, Gladys interrupts him, and Helwyze offers to read the manuscript and "make the rough places smooth" because he thinks "it is good" (143). Helwyze reads a "romance, such as many a lover might have imagined in the first inspiration of great passion, but few could have painted with such skill" (144). Indeed, the basic story, "the first inspiration" is Canaris' text; however, Helwyze revises as he reads so that the characters

"were full of vitality and color; their faces spoke, hearts beat, words glowed; and they seemed to live before the listener's eye, as if endowed with eloquent flesh and blood" (144-45). Gladys compliments Canaris, and her word choice again highlights the ownership issue; she explains, "You know that it is good, and you are glad and proud, although you will not own it" (146). Indeed, Canaris does not "own it," at least not entirely because Helwyze revised the text. However, the rewriting does not end here. When Helwyze reads the last part of the romance, he sarcastically asks, "Shall we burn it?" Gladys immediately protests because burning the manuscript "would be like burning a live thing" (149). However, she objects to the hero's death, and she rewrites the ending: "You must not kill that man: I cannot have him die so. Let him live to conquer all his enemies, the worst in himself; then, if you must end tragically, let the woman go; she would not care, if he were safe" (149). Despite Helwyze's protests, Gladys sticks to her revision because "the moral point would be lost, if it is not changed" (149), and she will not allow Canaris to "spoil his best piece of work by such a mistake" (150). In this moment, Gladys writes her own ending to her story. Just as her revision indicates, *A Modern Mephistopheles* ends with Gladys' tragic death in childbirth while Canaris lives to battle his enemies.

In an effort to regain control of the text, Helwyze draws on his past ties to Olivia, who still loves him, and asks her to "amuse Felix" because "he is falling in love with his wife, and it spoils both of them for my use" (173). However, when Gladys (under the influence of drugs Helwyze has given her) outshines Olivia when they act several scenes together, Canaris falls in love with Gladys because she is "a possession to be proud of, since. . .she could eclipse even Olivia" (211). Just as Canaris proposes because he wants

to own something that Helwyze wants, he now falls in love with her because her value as an art object increases. Through acting, Gladys again represents and becomes art subject to her husband's ownership. However, it is also important to point out that Gladys also sees Canaris as a possession. When she provides the strategy that helps Canaris defeat Helwyze at chess, she proclaims: "I have won him; he is mine, and cannot be taken from him any more" (184). Unlike Canaris, who in effect owns her upon their marriage, Gladys must earn the right to own her husband. She reinforces her claim when she forges her own bond with Olivia. Gladys explains that she is pregnant and asks Olivia to "give" her "little child an honest father" (214). She eventually secures Olivia's promise "not to tempt Felix's errant fancy with her beauty" (227) and turns her attention to Helwyze. Indeed, "both pleading and commanding in the name of wifehood and motherhood, for the right to claim the man she had won at such a cost," Gladys asks Helwyze to "abstain from troubling his soul with still more harmful trials" like Olivia (227). Despite his "lawless spirit" (227), Helwyze agrees that she will find "justice as well as generosity" in his soul (228). Through her own series of bargains, Gladys disrupts Helwyze's text.

In one final twist, Canaris contemplates murder as a way out of his pact when a servant asks Canaris to give Helwyze his medication and conveniently points out that an overdose would likely kill Helwyze. As the idea forms, Canaris, in an effort to distract himself, "caught up the first book at hand and began to read without knowing what he read" (251). The first line he consciously reads is Aeschylus' "Thy ominous tongue gives utterance to thy wish" (251). He tosses the book aside but then focuses on "a leaf of paper, lying half-shrivelled by the heat of the red fire" (251) that reminds him of "the hour when, in the act of burning that first manuscript, Helwyze had saved him, and all

that followed shortly after" (252). When he turns away from that reminder, he sees another: "a purple-covered volume, left on the low chair where Gladys usually sat, and often read in that beloved book" (252). He grabs the manuscript he has been working on and places his hand on it "as if taking an oath more binding than the one made there nearly three years ago" (252). Rather than relying on Helwyze's poetry, Canaris tries writing drama and "had been reading Shakespeare" because "one may copy the great masters" (252). However, "the grim and gracious models. . .seemed to rise and live before him" (252), playing out their most violent scenes as Othello stabs Iago, Macbeth grabs the dagger, and Romeo drinks his poison. Just as he holds the vial of choral over Helwyze's drink, Gladys interrupts, and Canaris is so disturbed by what he has almost done that he decides to confess everything.

Canaris reveals the true author through another act of revision when he hands Gladys a book in which he crossed out his own name as author and wrote Helwyze's instead. As Canaris stands "before her. . .as if she were both judge and culprit" (256) while he is "waiting for his sentence," Gladys can only ask, "Did you give up honor, liberty and peace for so poor a thing as this?" (258). The shock of Canaris' confession causes her to go into labor; she then lives out the ending she wrote when she dies, along with the baby boy, in childbirth. As Rena Sanderson points out, if Gladys represents the woman artist, then her future does not seem very promising, and just as Gladys' text indicates, Carnaris must live to seek "honest work"(285) as he "promise[d]" (286).

However, what are we to make of Helwyze and Canaris and their contracts? As the narrator points out, "a certain, almost brutal frankness characterized the intercourse of these men at times; for the tie between them was a peculiar one" (86). For Helwyze, the

tie gives him authorial control at the same time that he relinquishes legal title and ownership of his art. Helwyze's view of the contract becomes clear when Gladys rewrites the ending of Helwyze's revision of Canaris' romance. After she revises what he considers his text, Helwyze feels that "something has gone which he had bargained for, thought he had secured, and now felt wronged at losing" (170). As the author of the initial contract, Helwyze believes he owns his characters and writes their stories. However, through the process of revising Canaris' text and experiencing Gladys' revision of his revision, Helwyze can no longer claim to be author or owner. When he exchanged his poetry for Canaris' liberty, Helwyze could sever authorship from ownership and still maintain control over the text. Initially, as both author and owner, he could relinquish legal ownership, in much the same way that an author relinquishes a copyright, while retaining a moral claim to authorship that he could then use to manipulate Canaris and by extension Gladys as well. Both Helwyze and Canaris' actions seem suspect, perhaps because art, and not a house or a horse, is the object of their contract. Though the transaction might still be problematic, moral and ethical objections would seem less obvious if Helwyze had sold Canaris his house rather than his poetry in exchange for a year of Canaris' liberty. Indeed, as Gladys' response to burning the manuscript suggests, the manuscript itself seems like "a live thing" and thus a part of the person who created it, a notion than certainly complicates ownership—both for subjects and objects of exchanges.

If texts are part of their authors, then Helwyze, Canaris, and Gladys are bound together through the text they create. The process of constant textual revision and renegotiation suggests a different kind of contractual relationship than that embodied in

classical contract law. Rather than a series of static exchanges, the exchanges entered by Helwyze, Gladys, and Canaris are caught up within a web of complex relationships that destabilizes both the subjects and objects of those exchanges and opens up the possibility of transformed definitions of law as a means to recognize and justify individual rights and duties owed to others. As I suggested at the beginning of this chapter, in "M.L." love triumphs precisely because Claudia and Paul can write the "text" of their marriage contract in such a way that love and liberty are no longer oppositional terms; indeed, their marriage contract reflects both the "love of liberty" and the "liberty of love" (26). For Alcott, as the opening scene of "M. L." suggests, art plays an important role in this process because of its power to move people to love. Claudia falls in love with Paul when she hears him sing; his music "asserted her supremacy, wooing tenderly as any woman, ruling royally as any queen" (3). Paul's art moves her to love by "lifting her above the narrow bounds of time and place" and "touch[ing] the chords of that diviner self" (4). Thus, though Alcott certainly critiques classical contract theory for its inability to afford women legal status as full legal subjects and to recognize economic factors that indicate unequal bargaining positions, she leaves open the possibility that law can be transformed through love. At the same time, law can alter conceptions of love by providing a language, though limited, through which claims about justice can be made in a way that renders those claims recognizable to the system that they seek to transform.

Like Alcott, Howells often investigates the limits and possibilities of law to create and to describe just social relationships. Both Alcott and Howells demonstrate the tension between the hypothetical freedom, offered by the social contract and reflected in classical contract theory, and the material conditions that limit that freedom. Similarly, at

the same time contract offers the means for self-definition and self-realization, it also provides a stabilizing force that tends to thwart the very self-realization it offers. Though Alcott certainly points, particularly in *Work*, to economic conditions that frustrate self-realization, she focuses primarily on the failure to extend even hypothetical freedom to women and African Americans. Like Alcott, Howells pays attention to the ways in which material conditions undermine the hypothetical freedom and autonomy at the heart of classical contract theory. In the next chapter, I will explore Howells' response to these complicated issues.

CHAPTER THREE

The Promise of Past Performance: Contracts, Cannibals, and Civil Society in Selected Works by William Dean Howells

"A bad lawyer is such a very bad thing."
Eustus Atherton in Howells' *A Modern Instance*

In a chapter entitled "A Non-Literary Episode" in *My Literary Passions*, William Dean Howells describes his "first and only essay aside from the lines of literature" (93), a brief foray into the study of law. Howells studied with Ohio Senator Benjamin Franklin Wade with the intention of reading "enough law to go before a board of attorneys and test" his "fitness for admission to the bar" (93).[1] However, well aware of his own shy personality, Howells dreaded the "pettifogging before justices of the peace" that would form an essential part of his legal training (93). Before Howells got the opportunity to try out any courtroom skills, he diligently studied Blackstone's well-known *Commentaries,* but his legal career proceeded no further after he read Blackstone's "confession of his own original preference for literature" (93). As Howells explains it,

> I agreed with him that I could not go through life with a divided interest; I must give up literature or I must give up law. . . .[A]lmost from the fatal day when I found that confession of Blackstone's, my whole being turned from the "jealous mistress" [law] to the high-minded muses. (94)

Howells here divides law and literature into two separate realms that do not have much in common. That is, he situates law "wholly apart" from literature (93).

---

[1] Howells does not refer to the senator by name. In *The Black Heart's Truth*, John Crowley identifies Wade (35).

At first glance, law and literature seem quite different because law involves the very public "pettifogging" before the courts whereas literature occasions the private space suggested in Howells' "secret hope of one day living for literature" (95). He also admits that the decision to change careers was not a private one: "I did not regret it, but I had made my change of front in the public eye, and I felt that put me at a certain disadvantage with my fellow-citizens" (94). Howells seems quite concerned with how others view his decision, and he suggests that some people likely "thought. . .[he] was a fool" to give up "the chance of material advancement" as a lawyer (95). Howells believes as well that people think that he "was not returning to literature, but to the printing business," and he admits that he "felt the difference" (95). He also feels the difference between himself and others. For instance, he points out that his "reading" distinguishes him from others because it provides "different" "criterions [sic]" than "those of the simple life of. . .[the] village" (95). As Howells puts it, "My convictions were all democratic, but at heart I am afraid I was a snob" (95).

Despite the apparent differences between law and literature, Howells, though he chose literature, did not completely leave the law behind, and many of his novels address legal issues and explore the opposition of law and literature implied in Howells' account of his decision to change careers. In "A Non-Literary Episode," Howells suggests that law fulfills a public function by formally defining relationships among individuals, groups, and the state, and the lawyer, then, plays a public role by facilitating the operation of law; literature, in contrast, resides in the realm of "high-minded muses," and the writer, following "secret hopes," risks becoming a "snob" despite "democratic convictions." Thus, the lawyer participates in a public profession while the writer

follows a private calling. Throughout his career, Howells continues to explore this opposition, often employing legal discourse, particularly the language of contract, to describe both legal and ethical claims. For Howells, legal discourse reflects a particular double-bind. On one hand, Howells wants to validate human agency, and in this respect, his view of agency seems quite close to classical contract theory's vision of autonomous agents who can choose their own ends. On the other hand, Howells, as I will demonstrate, clearly recognizes that to validate classical contract's account of autonomy must simultaneously call that account into question.

As a review of his letters suggests, Howells often played an active role in his own contractual negotiations with various publishers and editors, and his accounts of these negotiations reflect a similar division to that expressed in "A Non-Literary Episode." Howells deployed both a public identity that attends to legal questions and a private identity that attempted to supplement law through an appeal to ethics. For instance, when he feared his publisher Osgood was about to fail financially, he immediately looked to Harper & Brothers as a potential replacement. After Charles Fairchild approached Harper on Howells' behalf, Howells wrote Harper himself on March 13, 1885: "I think the high contracting parties to the treaty which our friend Fairchild has negotiated may now fitly recognize each other. . . .Aside from the substantial advantages, in which I shall do my best to make you equal sharer, I prize personal relations" (*Selected Letters* 3: 119). Though Howells certainly acknowledged the necessity of protecting his interests by formalizing his obligations to his publisher in a contract, he also recognized an ethical basis for relationships that seems to lie outside the scope of the legal relationship defined by the contract. Indeed, "personal relations" do not derive solely from the contract.

Howells' correspondence with Benjamin Ticknor also suggested Howells' recognition of an ethical basis for relationships that cannot be adequately captured by the language of contract. In this case, contract law structured market-based transactions that threaten Howells' sense of ethics. Ticknor contacted Howells on June 1, 1885, regarding the purchase of Osgood's assets and business and indicating that he would like to "assume and perform" any contracts existing between Howells and Osgood (3: 123 note 3). Howells, in turn, explained, in a letter of June 10, 1885, that he asked his lawyer, Samuel Wells, to determine his "legal status" under his "old agreement" with Osgood (3: 123). Howells also admitted that he had "agreed conditionally" with another publisher before he knew that Ticknor planned to purchase Osgood's business, and he asked Ticknor to keep their correspondence confidential (3: 123). Though he could not provide a final answer, Howells promised to consider the offer. He wrote: "You may be sure, also, that in any final arrangement I will not consider my own rights and interests alone" (3:123). Despite his attention to economic issues, Howells made it clear that he does not consider himself solely a self-interested bargainer. Thus, Howells negotiated two self-representations that seem quite different; he is both a legal subject who turns to his lawyer to define his "legal status" and an ethical subject who is careful to point out that he recognizes the "rights and interests" of others, perhaps because he does "prize personal relations."

However, as the negotiations progressed, these self-representations conflicted with each other. Howells eventually signed a contract with Ticknor on July 20, 1885, and this agreement provided for a series of payments and royalties for work Howells had already furnished for Osgood. Howells also agreed to write several short stories for

Ticknor and to allow Ticknor to republish several novels. Apparently the republication issue created some confusion because Howells retained the right to republish the novels himself, and Ticknor was afraid that Howells would allow Harper to republish all of the material. Howells wrote Ticknor another letter on September 12, 1885, and the tone of the letter suggests that Howells was annoyed by the entire situation:

> You may be sure that I will consider your interests in the utmost degree practicable and consistent with my own in any arrangements I may make, hereafter; and this from pure good will, for Mr. Wells has always instructed me that you did not inherit my contract with Osgood & Co., and I think you used his written opinion to that effect in settling with one of the banker-creditors of that firm.
>
> I cannot tell yet—for I don't know—what shape my republications may take; when I do know you shall know it from me, and not from the newspapers. (3: 129)

Frustrated with Ticknor's turn to the newspapers' highly publicized speculations about his decision, Howells asserts private correspondence as the best source of accurate information. The self-representations as the legal subject and the ethical subject merge when Howells continues to recognize Ticknor's "interests" but only to "the utmost degree practicable." Apparently, those interests turned out not to be particularly relevant from Howells' perspective. He eventually decided to sign with Harper, and, in exchange for a salary, Howells agreed to write the Editor's Study columns and one novel per year for serialization in *Harper's Monthly* (3: 131, n1). Howells could earn additional compensation for other contributions to *Harper's Monthly* and *Harper's Weekly*.

In 1889, Howells and Harper decided to renegotiate the terms of their association. Harper indicated that it wanted to "terminate" the existing agreement and "to make a new arrangement. . .more advantageous both to you & to us" (3: 259, n1). Howells proposed two arrangements in a letter of September 23, 1889:

> I will write you the *Study* and a farce *each* year, and *every other* year, a novel to run through twelve numbers of the magazine, and to make not less than one hundred and fifty magazine pages; for this work you shall pay me $10,000 a year; and for anything more, you shall pay me extra, taking all I write, or allowing me to sell it elsewhere. Or, . . .for $13,000 a year I will write you the Study, the Farce, and the Novel, as before stated, and will give you all I can do besides. (3: 258-59)

He also indicated that he preferred the second option because he could "work with a mind absolutely free" and could "give" Harper "more value for less money" (3: 259). Harper, however, countered with a slightly different proposal, and Howells agreed to the new terms in a letter dated October 17, 1889:

> I now accept your offer of $5000 for a farce, and for the Editor's Study during 1891, upon the condition that I offer all that I write during that year, at $50 a 1000 words for the Monthly and $30 for the Weeklies; with the understanding that each piece of work is to be accepted only by the periodical to which it is offered and if rejected, the right to offer it elsewhere becomes mine. (3: 261)

As these letters suggest, Howells ultimately accepted a contract for more uncertain terms than the ones he described in his original proposal, so perhaps Howells experienced the

same kinds of uncertainties that plague his characters, particularly Bartley Hubbard and Basil March. Though Howells' contracts do provide structure for future relationships, they also suggest the instability inherent in the literary marketplace because Howells' past performance for Harpers is not enough to secure their future relationship according to the terms Howells initially proposes.

Copyright law proves similarly unstable for writers. Howells addresses copyright problem in several installments of the Editor's Study, and his approach again suggests the complex relationship of law and literature in that literature provides an ethical supplement to law and is, itself, the object of an ethical claim. In the December, 1890, Editor's Study, Howells describes a fictional political shift, disguised as the Editor's dream, during which "the imperfect republic of the United States of America had given place to the ideal commonwealth, the Synthetized Sympathies of Altruria" (288). In this new order, "antagonistic" "principles" are reconciled, including "the substitution of emulation for rivalry, the harmonization of personal ambitions in a sweet accord of achievement for the common good" (288). In the old order, Congress failed to pass an international copyright bill, thus making it a "national sin and shame to take the work of foreign authors from them, and not pay them anything for it" (289). Here, Howells describes law as a means to construct property and thus suggests that the law itself is unethical. The new order of Altruria operates according to different principles in that the people "unanimously adopted" an international copyright bill which provides that publishers pay foreign authors for new books and that the "S.S. Treasury" pay "a voluntary restitution by our whole people of the money kept from them [the foreign authors] in the past" (290). After a ceremony during which foreign authors receive

restitution, a Congressman "who had been one of the bitterest opponents of international copyright" experiences a "change of heart" and proposes "Perpetual copyright" (292). The Congressman points out that

> he did not see why a man should not have as lasting property in something he actually created, like a book, as in something he had simply come by in the way of trade, perhaps honestly, perhaps dishonestly. (292)

With this startling proposal, the Editor's Study wakes from its dream about a different form of social organization.[2]

One year later, in the December, 1891, Editor's Study, Howells revisits the Altrurian dream and finds the Altrurians celebrating the "bicentennial of international copyright" and the passage of the "act of Common Honesty" (347). After passing the international copyright bill, the Altrurians recognized another "injustice": that the "literary class," "the noblest and truest class in the whole republic," "had no lasting claim to the property they had created" even though "all other kinds of property were fully protected and warranted in perpetuity to the owners" (347). In response to the Altrurians' concerns, the Editor's Study points out that "property is the cornerstone of civilization. The law cannot inquire how a thing became property" (347). The Altruians realize that those "proprietors who *created* their property" (348) were both "not equal with others before the law" and "branded with a stamp of inequality" (347). While other forms of

---

Howells' distinction between the United States and Altruria seems to rest on Marx's distinction between civil society founded on law and the state founded on, as Howells puts it, the "General impulse" of the people acting as one. However, the persistence of individual property rights in both the United States and Altruria complicates the opposition of legal and ethical claims.

property could "be inalienably yours," literary property "was not yours forever, but only for a certain term of years" (348).

To redress this inequality, the Congress declared "property in copyrights perpetual," but the law was challenged in the Supreme Court and eventually struck down (348). The Court admitted distinctions among different types of property; the property that a man created "was of such a volatile or elusive nature that it could only be secured by its owner for a brief term of years" (348). The Court also accepted the claim that the artist is "a public benefactor and must be made to feel it" (348). However, the Court recognized that this claim amounted to a "legal fiction" and ordered the lawyers to copyright the legal fiction "like the other fictions" (348). When the forty-two-year period ran out, "the lawyers who had created this fiction protested against the communization of their property" and again took the issue to court (348). Eventually, the people voted to limit all property ownership to a period of years.

When the Editor's Study wonders if the solution is "contrary to human nature," an Altrurian points out that "once it was human nature for men to eat men, . . .for men to enslave other men, for men to work other men to death in mines, . . .for men to hold large tracts of land idle while other men were starving," and for men to limit certain kinds of property ownership to a period of years (349). As the Altrurian suggests, "human nature changes" (349). The Editor's Study watches as Altrurians both renounce their property and assume responsibility for other property: "those that assume the responsibility. . .covenant. . .to see that those who renounce it share it equally with themselves in its enjoyment, if they will work" (349). In this account of Altruria, Howells moves much closer to Marx's conception of property because property ownership, while not

completely communal, is no longer absolute. In the absence of traditional conceptions of property ownership, a "covenant" is still necessary to assure that the property can be enjoyed "equally" by all the workers. However, Howells does not elaborate on the terms of that covenant, so it is difficult to determine what sharing property "equally" means in practice. Though the celebration continues, the Editor's Study eventually awakes,

> happy to find itself again in the good old familiar world where everybody has a right to his own forever, except the author, who has a right to his own for forty-two years. (349)

In the "familiar world" of the United States, the law does not protect artistic property in the same way that it protects other kinds of property. Howells thus suggests that, in some respects, the law does not provide justice, and this issue appears throughout his work.

For instance, in *A Modern Instance,* Howells explores the basis of obligations to others and contemplates the significance of several legal and ethical theories of obligation. He explores legal theories of obligation to justify ethical claims that fall outside the letter of the law, and suggests that law as public force and ethics as private deliberation sometimes conflict. Howells' interest in legal questions is apparent even in his prospectus for the novel. In a February 18, 1881, letter to his publisher, Osgood, Howells indicates that the novel will address "the question of divorce" (*Selected Letters* 2: 277). This "theme" is "only less intense and pathetic than slavery" (277). Howells' comparison implies a connection between the possibility of ending the contractual obligations of marriage and the issue of slavery, and it is important to keep in mind the connections among marriage, slavery, and contract. As I discussed in Chapter Two, both women's rights advocates and abolitionists often turned to contract theory for a language

to describe and to justify their claims for freedom. By hierarchically situating divorce only slightly "less intense" than slavery, Howells complicates the relationship between the two. The most likely connection between the two issues can be established through the role of classical contract theory in constructing both issues: simply put, according to hypothetical freedom of contract, both African Americans and women should be able legally to make and break contracts as a condition of freedom. However, in *A Modern Instance*, Howells seems reluctant to argue that marriage represents a contractual relationship that the parties should be able to sever like any other contractual relationship.

Despite Howells' attention to legal issues and his brief legal training, the role of law in his work receives only sporadic treatment by most literary critics. Indeed, Brooks Thomas is one of the few critics to consider the relationship between contract and literature in late nineteenth-century American literature; Thomas suggests that some realist novels "evoke the promise of contract and dramatize its failure to be sustained" (2). In selected works of realism, contract fails for two reasons: first, because status-based relationships persist in spite of contract; second, because the promise of contract "cannot be sustained by a network of immanent exchanges among social, economic, and political realms" (49). However, despite these failings, Thomas also believes that realist novels simultaneously capture the promise of contract; that is, contract promises a "dynamic" society because, "not bound by inherited status, individuals are free, on their own initiative, to negotiate the terms of their relations with others" (2). Thus, the "moral foundation" of a contractual society derives not "from preconceived notions of status but from the duties and obligations that individuals impose on themselves" (3). In this sense, contract "promises an immanent, rather than a transcendental, ordering of society" (3).

However, as I will demonstrate in my discussion of *A Modern Instance,* Howells complicates the idea that contracts exemplify freedom by allowing people to choose their obligations. For Howells, the connection between obligation and consent proves troubling. Indeed, Howells concludes his prospectus for the novel with an ambiguous description of his own obligation as a writer: "I shall do my best with it and I must let my past performance promise what that will be" (277). This statement is interesting because Howells describes his obligation through legal terminology—"past performance." From a legal standpoint, promises typically address future performance without regard for past events or relationships. Indeed, classical contract theory assumes that most contracts are executory in nature because they formalize a promise to act or to refrain from acting a certain way in the future and, thus, offer the opportunity to plan for the future by stabilizing relationships with others (Atiyah *Introduction*, 53-54). In this sense, a contract provides a clean slate from which to construct future relationships. However, by acknowledging past performance, Howells suggests that contracts have a history, that contracts are already embedded within particular relationships and conditions. Thus, a promise that derives its terms, at least in part, from past performance attempts to bring both the past and the future into the present moment and to secure temporal equilibrium and consistent self-representation over time.

In *A Hazard of New Fortunes*, in turn, Howells investigates the potential of legal contracts to stabilize an uncertain future through insuring against certain risks. In this novel, he considers the implications of a fully contractualized world; indeed, most social relationships presented in the novel derive from contractual ties, and most of the characters are connected, in one way or another, with the literary magazine *Every Other*

Week. The magazine's founder, Fulkerson, describes it as "the idea of self-government in the arts" (183), and his language suggests that *Every Other Week* represents a democratic space within which artists can break free from "the bondage of publishers" (11) and define themselves according to contractual logic. For instance, Basil March, one of the main characters, accepts a position as literary editor because the position seems to offer him the opportunity to become his authentic self. However, he enters a complicated web of contractual relationships that operate instead to undermine the stable sense of an authentic self and of a predictable future.

In the following sections, I will demonstrate that Howells makes use of legal discourse to reflect both the limits and possibilities of classical contract theory's conception of autonomy and to suggest instead a provisional version of agency that takes into account how the tension between longing for freedom and recognizing constraints constitute human agency.

"The things all on paper and that makes us cautious": Writing the Contract, Reading the Terms in *A Modern Instance*

Often described as Howells' divorce novel, *A Modern Instance* is typically viewed as an indication of the breakdown of the traditional family and of the more general moral decline in the late nineteenth century or as Howells's mode of working through personal problems.[3] The novel tells the story of Bartley Hubbard, a newspaper

[3] For instance, Sam B. Girgus posits the decline of the family as evidence of the decline of society in general. Both Bartley and Marcia reflect the narcissism characteristic of a "new society of immediate wants and needs," and both "embody the failure of this new morality to invent new institutions to replace the family as the center for the development of moral authority" (43). While Howells certainly sees the need for divorce in some situations, he also suggests "that a loveless society based on the narcissism of perpetual demand would lock each of us in a prison of the self" (43). Susan Stone focuses on social decline

man who, like Howells, contemplates becoming a lawyer, and Marcia Gaylord Hubbard, a young woman from Equity who eventually marries Bartley despite the objections of her father, Squire Gaylord. Gaylord is Equity's only lawyer and, for many critics, represents an old way of life predicated on communal values that is disappearing due to increased industrialization and urbanization. Marcia and Bartley leave Equity for Boston, where Bartley pursues, often through ethically questionable practices, a career as a newspaper reporter.

Throughout the novel, Howells pays particular attention to the characters' obligations to each other as well as to society in general, and a few critics note the role of contracts in defining those obligations. In the only article that focuses specifically on contract law, "Status and Contract: The Divorce Dispute of the 'Eighties and Howells' *A Modern Instance*," George R. Uba reads the novel within the context of nineteenth-century legal theory and debates about divorce appearing in periodical literature. Against this backdrop, Uba argues that the novel tracks the shift from a status-based society, which privileges family and views marriage as sacred, to a contract-based society, which privileges the individual and views marriage as a civil contract subject to termination like any other contract. Uba draws on Henry Sumner Maine's *Ancient Law* in which Maine

---

by charting Thoreau's influence on Howells and arguing that Howells laments the loss of a transcendental past in the wake of capitalism and urbanization (156). Joseph Allen Boone suggests that while Howells wanted to present a realistic view of marriage, his "deep allegiance to Victorian social order and the good life" made it difficult, if not impossible, to critique fully the "societal assumptions" that underlie the Hubbards' marital problems (72). The same allegiance also "dictates the closed field of his narrative organization" (72). Thus, rather than reading the ending as open, Boone sees it as closed because the final scene, in which the Athertons discuss whether Ben Halleck should propose to Marcia, advocates "the social good at the expense of the individual" (74). Ellen F. Wright, in turn, contests the claim that Howells critiques nineteenth-century society and social institutions. She claims that the novel is about "character rather than social environment" (228); "the blame for the Hubbards' divorce, then, lies squarely with the Hubbards" (226). Crowley, in *The Black Heart's Truth*, explores the impact of Howells' personal

argues that "progressive societies" move "from status to contract" (qtd. in Uba 79). According to Uba, the novel "recasts Maine's theory almost exactly as the writers in the periodicals were doing" (87). Bartley Hubbard represents the "contractual view of marriage" (84) because he "honors" his agreements only "in direct proportion to their legality as contracts" (85). In contrast, Marcia Gaylord and Eustace Atherton (an acquaintance of the Hubbards) represent the view of marriage as a status-based relationship that confers specific duties and obligations based on the relationship itself (87). For instance, "unlike Bartley, Marcia honors relationships not in proportion to their legality as contracts but in simple proportion to their bearing upon her marriage" (85).

Though Uba provides an important account of the role of contract in the novel, his readings of Bartley and Marcia oversimplify the complexities both of their relationship and of contract theory itself. Neither Bartley nor Marcia can be so easily linked exclusively with status or contract, and the novel explores several notions of obligation that tend to complicate the transition from status to contract that Uba observes. Like Uba, Brook Thomas also focuses on this transition and suggests that the novel "registers the divided reactions to the movement from status to contract" (29). By naming the town Equity, Howells invokes the tradition of equity courts as one way "to provide justice not accounted for by the narrowness of written law" (27); however, a return to equity poses other problems because equity, in considering "the specifics of individual cases," includes "considerations of status" (37). Thus, Thomas argues that *A Modern Instance* "wrestles with the difficulty of fulfilling contract's promise in a world in which a

---

problems—particularly his daughter Winnie's illness and death, and his psychological issues such as hypochondria and hydrophobia—on *A Modern Instance*.

modern, contract-based economy undermines traditional institutional structures and communal relations used to guarantee equity" (49); for Thomas, Howells' ultimate position "is not completely clear" (28). According to Thomas, Howells situates agency at "the moment of translatability" (121); because his characters are unable to ground their actions in religious duty or civic virtue, "they are responsible for taking the risks of translating duties into action" (121). As Uba and Thomas suggest, contract theory certainly plays an important role in *A Modern Instance*. However, the shift from status to contract does not provide a full account of the function of law in this novel. Indeed, Howells presents the decline of Equity (both the town and the concept) as a given and instead turns to the notion of obligation itself in an increasingly contractual world. The novel then poses several fundamental questions about obligation: What is the source of obligation? How can obligations to others be justified?

One answer is that posited by the classical contract model (both Uba and Thomas refer to this model when they talk about contract): the promise signifies the parties' intention to act a certain way in the future. In the act of promising, the parties experience what late nineteenth-century contract law called a "meeting of the minds," within which both parties have the same understanding of what the contract means and what they intend to perform; the contract, then, manifests the will of the parties. Thus, the contract represents acts of free choice, and the mutual promises justify the contract. Because the parties freely choose to enter a contract, the application of the law is then perceived as neutral if the parties later disagree about how the contract should be performed. The court merely enforces what the parties chose to do in the first place.

While classical contract law presumes that the application of law is neutral because the court merely enforces what the parties voluntarily agreed to do in the first place, tort law presumes that the application of law is not neutral because the court defines certain obligations to others that are not predicated upon consent. Indeed, tort law establishes obligations to others outside the context of contractual relationships and justifies the legal recognition of obligations not grounded in promises. However, it is also important to point out that tort law also depends upon consent in the sense that the justification for any law depends on hypothetical consent to the social contract. Though tort law addresses wrongs that occur outside contractual relationships, the boundary between tort and contract is not always a clear one. Thus, many twentieth-century legal scholars view tort law and classical contract law as closely interrelated.[4] Grant Gilmore describes classical contract theory "as an attempt to stake out an enclave within the general domain of tort" (*Death* 87). Horwitz also points out that classical contract theory depended upon clear and distinct boundaries between itself and other areas of the law, particularly tort law (*Transformation* 33-63). In an effort to address complaints that a "meeting of the minds" was too subjective to justify contractual obligation, some theorists turned to objective standards that focused on external manifestations of intention while other theorists worked to salvage some element of the voluntarism emphasized by the "meeting of the minds." According to Horwitz, both positions eventually "merged when the outer limits of objectivism were seen to leave no basis for any clear distinction between contract and tort" (48). Thus, "duties deriving from contract and tort could not

[4] For instance, in *The Death of Contract,* Grant Gilmore argues that in the twentieth century, "'contract' is being absorbed into 'tort.' Until the general theory of contract was hurriedly run up late in the nineteenth

be distinguished in terms of the source of obligation. In both cases, collective social objectives might legitimately overrule the individual will" (49).

In *A Modern Instance,* Howells explores both individual will and collective considerations as justifications for obligation. In order to frame my discussion of obligation, I would like to focus on a peculiar moment that dramatizes the clash between individual will and collective objectives. After the Hubbards move to Boston and Bartley establishes himself as a journalist, they attend a party at the suggestion of Bartley's old friend Ben Halleck. However, Halleck's family and their social circle view the Hubbards as inferior, and the hostess decides not to serve a meal so that the Hubbards will leave early. During the party, Bartley seems to be daydreaming, and, when Marcia later asks what he was thinking about, he mentions that there was no food and says, "I was casting lots in my own mind to see who I should devour first" (383). He continues with the joke when he comments on "an elderly aristocrat's conjecturable toughness" (383). Here, Bartley imagines cannibalism and justifies harming another person by appealing to a model of consent, a model explored in several important and sensational mid-nineteenth century court cases that squarely confront the source of obligation to others by pitting individual rights against the common good.

In United States v. Holmes (1842), a case Howells very well could have been familiar with since he set type for his father's Ohio newspaper from the time he was a small child, the jury struggled with incredibly sensationalistic facts. A group of passengers and crew (forty-one people total) got in a lifeboat when their ship sank after

---

century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again" (87).

hitting an iceberg. Unfortunately, the lifeboat was leaking and unable to stay afloat with all the passengers on board, so the crew tossed fourteen male passengers overboard. The only principle of selection was "not to part man and wife, and not to throw any women overboard" (384). After being rescued, a crewmember, Holmes, was tried for murder. While the prosecution focused on Holmes' breach of duty to the passengers thrown overboard, the defense described a return to the state of nature in which positive law no longer applied and instead the law of necessity dictated Holmes' actions and abrogated his obligation to the others. The defense argued that the "case should be tried in a longboat, such down to its very gunwale with 41 half-naked, starved, and shivering wretches,. . .a hundred leagues from land,. . .subject to certain destruction from the change of the most changeful of elements, the wind and the waves" (385). The defense claimed that the situation itself rendered Holmes' actions beyond judgment: "fairly to sit in judgment on the prisoner, we should, then be actually translated to his situation" (385). Despite this appeal, the judge focused on the selection procedure: "there should be consultation, and some mode of selection fixed, by which those in equal relations may have equal chance for their life" (386). According to the judge, drawing lots would have been the best way to ensure procedural fairness because all the parties consent to the procedure and agree to abide by its outcome:

> When the selection has been made by lots, the victim yields of course to his fate, or if he resists, force may be employed to coerce submission. Whether or not a case of necessity has arisen. . .cannot depend upon his own opinion; for no man may pass upon his own conduct when it concerns the rights, and especially, when it affects the lives of others. (386)

Here, both the right to use force to compel performance of the agreed-upon terms and the terms that provide for an act of cannibalism expose the violence of the contract. However, the court apparently saw mitigating circumstances in Holmes' situation. Though the jury convicted Holmes, the judge reduced his sentence to six months, with credit for the time he had already served awaiting trial, and a fine of twenty dollars. The court accepted that a kind of utilitarian calculus must be done in order to preserve the most lives; however, that calculus must be conducted under conditions of procedural fairness so that the violent consequences could be justified.

While the Holmes case does not involve cannibalism, the idea that drawing lots provides procedural fairness and obligates those who consent to participate illuminates Bartley's remark even though the "participants" in his account do not consent. For Bartley, drawing lots makes the outcome fair. Bartley's idea of drawing lots to justify consuming another person is directly at issue in a prominent English case, Regina v. Dudley and Stephens (1884).[5] In this case, four people (the defendants Dudley and Stephens, another adult named Brooks, and the seventeen or eighteen-year-old Richard Parker) ended up in a lifeboat when their ship sank. After eighteen days at sea, and seven days without food or water, Dudley suggested "that lots should be cast who should be put to death to save the rest" (273). Brooks "refused to consent," and "there was no drawing of lots" (273). A day later, Dudley and Stephens agreed to kill Parker, who was injured

---

[5] Though the Dudley and Stephens case occurred after Howells wrote *A Modern Instance,* the facts of the case are eerily similar to a scene in Edgar Allan Poe's *The Narrative of Arthur Gordon Pym* (1838). The narrator and several shipmates (Augustus, Dirk Peters, and Richard Parker) are cast adrift in a lifeboat, and, after many days without food, Parker proposes that one of them "should die to preserve the existence of the others" (90). He suggests "a terrific lottery" in which they will "draw lots" to decide who will die (92). Richard Parker draws the short straw, and his comrades quench a "raging thirst" by "consuming the blood

and weak, though Brooks again refused. Dudley killed Parker, and the three remaining men "fed upon the body and blood of the boy" until they were rescued four days later (273). When Dudley and Stephens were tried for murder, the jurors declared a special verdict that basically turned the outcome over to the judge, Lord Coleridge. Ultimately, Lord Coleridge, recognizing that "the absolute divorce of law from morality would be a fatal consequence" (274), refused to recognize necessity as a defense and found them guilty of murder. He provided the following justification for his decision: "we are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might have yielded to it. . ." (274). Through a complicated series of legal moves, Dudley and Stephens were convicted of murder, but their sentences were reduced to six months each in prison.

Both cases focus on whether or not the parties involved drew lots to ensure some sort of fair selection process, and both cases raise compelling questions about obligation, questions that Howells takes up in *A Modern Instance*.[6] The courts are willing to accept

---

of the victim" (94). Simpson's *Cannibalism and the Common Law* focuses on the Dudley and Stephens case; indeed, his work suggests that the case was well-publicized within the United States.

[6] Both Holmes and Dudley and Stephens received extensive treatment in the periodical literature of the time. According to Simpson's *Cannibalism and the Common Law,* the popular press told Holmes' story and generated quite a bit of public sympathy, and the Seaman's Friend Society even tried unsuccessfully to get President Tyler to pardon Holmes (161-76). In addition, several accounts of cannibalism in the frontier were sensationalized by the press. For instance, in the October 17, 1877, edition, *Harper's Weekly* ran a story, accompanied by gruesome drawings of partially decomposed human remains, about Alferd Packer. Packer, along with several other men, left an Indian camp to travel to Los Pinos despite the Indians' repeated warnings about bad weather. Packer arrived in Los Pinos alone, sixty-five days later, and when questioned about his companions, he claimed that two men died naturally and were eaten by the remaining men, including Packer. According to *Harper's,* "one can easily picture the horror of this situation for the two men left alive—the sleepless watch, the dread of being for a moment off guard against the hunger-kindled ferocity which each knew was burning in the other's breast" (852 column 3). Packer eventually killed and ate the other two men, and when the bodies were discovered, "marks on each body indicated that a most terrible crime had been committed there" (852 column 4). Also, C. F. McGlashen's *History of the*

a consequentialist outcome—that some individuals must die in order that the majority may live—but only on deontological terms that recognize that each individual must consent to that outcome. Indeed, drawing lots suggests classical contract's account of obligation and justice because the participants must, as the Holmes case suggests, rewrite the social contract in a moment akin to the state of nature in which, as Hobbes puts it, "every man has a right to every thing; even to one another's body" (87). Since the events of both Holmes and Dudley and Stephens occur at sea and outside the geographical boundaries of civil society, the violence of the acts themselves can, then, be spatially distanced from the actual borders of civilized society; in this sense, cannibalism (or the violence of the Holmes case) indicates otherness, just as it is when it refers to the "savages" from another culture in texts like *Robinson Crusoe*. As Kristin Guest points out, the cannibal is "associated with absolute alterity and used to enforce boundaries between a civilized 'us' and savage 'them'" (2). However, as Guest also notes, cannibalism can also be "read as a symbol of the permeability, or instability" of the boundaries it seems to establish" (2). Similarly, both courts imply that spatial distance alone is not enough to maintain the boundary between civilization and savagery, because even if the situations mirror the state of nature, a kind of natural necessity (or utilitarian calculus) cannot, in and of itself, justify violent actions. Thus, it is only when the parties

---

Donner Party was reissued in 1880. In the August 1886 edition of "The Editor's Study," Howells discusses Adolphus Washington Greely's *Three Years of Arctic Service*. Greely and his party set out on a polar expedition in 1881 and disappeared until seven of the original twenty-five people were rescued in 1884 (Simpson 160-61). Rumors soon surfaced that the survivors participated in cannibalism, and Simpson cites an August 12, 1884, front-page story in the *New York Times*. When Howells wrote about Greely's account two years later, he does not directly discuss cannibalism, though he seems to allude to it when he claims that "we need not recite the points of the story so well known" (35). However, he does mention that the members of the expedition created and enforced their own law. For instance, when a man steals food from the others, "he is sentenced, and two dying men put him to death, in a perfectly business-like way. All goes on orderly, and with a ghastly conformity to the life-long usages and habits" (35).

freely choose to participate in the process of drawing lots that the violent outcomes can be justified. The logic of both courts suggests that a fair procedure justifies a radical departure from the Kantian maxim that human beings should always be treated as ends, not means. Obligations to others cannot be conceived of as the universal duties of the categorical imperative; instead, obligations to others can be modified by, or derived from, contract. Both cases also draw attention to the role of violence in the formation of the social contract and, by extension, civil society. The threat of natural violence—starvation or drowning—motivates individuals to enter a contract that justifies subsequent acts of violence as well as the use of force to compel its enforcement.[7]

Bartley Hubbard's remark situates cannibalism within civil society, justifies cannibalism (consumption) through a model of consent, and highlights the role of violence in the formation of the social contract, and by extension, other contacts as well. Throughout *A Modern Instance,* Howells suggests that the "other," the cannibal, can no longer be understood solely as the savage located outside civil society. Instead, Howells repositions cannibalism within civil society to reveal that the boundary between us and them, or self and other, is illusory and that, as a moment of violence, cannibalism exposes the violence both in constructing and in deconstructing that boundary. Similarly, Howells implies that the conditions of extremity that characterize both the state of nature and the lifeboat dilemma are made to seem natural in capitalism. In *A Modern Instance,* Bartley

---

[7] Thomas Hobbes points out that "before the names just and unjust can have place, there must be some coercive power, to compel men equally the performance of their covenants, by the terror of some punishment" (95).

is not the only potential cannibal in the text. Indeed, consumers (both of objects and information) are also cannibals. As Walter Benn Michaels explains,

> Howell's hostility to capitalism derived not so much from the amply documented humanitarian horror he felt in the presence of capitalistic excesses of wealth and poverty as from his fear of the principled commitment to excess he correctly sensed at the core of even the most moderate and benign capitalism. (50)

By linking cannibalism and consumption, Howells exposes both literal and metaphorical moments of violence that call into question both legal and ethical accounts of obligation.

In the opening scene of *A Modern Instance,* Howells begins his exploration into obligation by considering what it means to make a promise. In this scene Bartley Hubbard wants Marcia Gaylord to promise to write to him if leaves Equity, Maine, to study law and seek his fortune in Chicago.[8] Both Bartley and Marcia focus on promising as a way to structure future relationships and events. For instance, when Bartley threatens to leave Equity just to see if Marcia will write him, Marcia laughs as she points out that she has not "promised to write yet" (181). Bartley urges her to "promise at once" so he

---

Bartley, the editor of the Equity *Free Press*, seems the perfect embodiment of free contract as a way to rise above the position afforded through status relationships alone. Indeed, Bartley gets the position as editor because his status as an orphan lacking family connections "turned the scale with a committee who had all been poor boys themselves and justly feared the encroachments of hereditary aristocracy" (191). However, Bartley's social position in Equity is secured not by his job as editor but by his intention to study law because law provides "a guaranty of his superiority that nothing else could have given" (199). In contrast, Marcia Gaylord's position derives from her father's social status. Squire Gaylord is Equity's only lawyer, a profession that affords him "the highest distinction in a country town" (199). Though most critics suggest that the Gaylord family (and Equity itself) represents status in opposition to contract as a form of social organization, it is important to point out that Squire Gaylord's status comes from his occupation rather than his family connections and that Marcia's status derives from her father's primarily because she is a woman. Thus, status seems more likely to determine a woman's place in the world than a man's because men can enter contracts and enter professions more easily than women.

can leave (181), but Marcia suggests that such a promise would be "too much like marrying a man to get rid of him" (181). Bartley then changes his approach and invites Marcia to go for a sleigh ride the next day. When Marcia again refuses to answer, he decides to make his "request in writing" (183). After some discussion over specific word choices, Bartley drafts a contract in the form of a letter: "Dear Marcia: Will you go sleigh-riding with me tomorrow afternoon at two o'clock sharp?. . .With unalterable devotion, Yours Truly, Bartley J. Hubbard" (183). Since Bartley asks Marcia to promise to do something in the future, his draft closely resembles the classical contract conception of what a contract should do—namely, plan for the future. However, Howells also provides several details that serve to undercut that model. After Bartley reads the letter aloud, Marcia snatches it away, but he grabs her hands before she can tear it. When she tells him to let her go, he replies, "On two conditions—Promise not to tear up my letter and promise to answer it in writing" (183). When Marcia seems to relent, he lets her go, but she writes "No" on the paper (183). Bartley then grabs her hands again and actually guides the pencil on the page so that she writes "Yes" and signs her name (184). Though the scene creates a playful mood as they flirt and banter with each other, the scene, no matter how benignly presented, still registers an undertone of coercion. That Marcia's assent is forced undercuts classical contract theory's assumption that contracts reflect individual will because the contracting parties freely choose the contracts they enter. Indeed, the dynamic at work in this scene suggests that the unequal bargaining positions may undermine the idea that obligations to others are always freely chosen.

The way Bartley drafts the letter undercuts the power of language to describe relationships and to carry legal significance in its own right; thus, a promise in writing

may not mean more than a spoken promise. When Bartley contemplates the opening salutation, he wonders if he should begin with "Dearest Miss Marcia, or just Dear Marcia" (183). As he explains the dilemma to Marcia, "You're one or the other, you know. You're dear,--to your family—and you're Marcia: you can't deny it. The only question is whether you're the dearest of all the Miss Marcias" (183). Bartley experiences a similar dilemma when he considers how to sign the letter; though he prefers "affectionately," Marcia tells him "it had better be Truly," and Bartley agrees, claiming that her "word is law—statute in such case made and provided" (183). Marcia's preference indicates the desire for language to represent adequately the truth; she wants "Yours Truly" to describe quite literally Bartley's relationship to her. The opening scene, then, suggests problems with viewing the promise as the source of obligation because the promise itself can be coerced and language can fail to represent adequately the content of the promise and thus provide a clear account of what the parties intend. Bartley's dilemma suggests another significant issue: how, given the slippery quality of language, can the parties be sure they actually mean what they say and thus should be obligated to perform whatever they promised to do?[9] Put another way, how do they know if their minds really met?

The difficulty of adequately describing the intention and thus establishing the content of the parties' promises becomes even more apparent in farcical negotiations

---

[9] In a famous nineteenth-century contracts case, Raffles v. Wichelhaus, the court confronted just such a problem when the parties agreed that goods would be delivered on a ship named the *Peerless*. Unfortunately for the parties, two ships named the *Peerless* operated on the same shipping route, and each party meant a different Peerless so that the shipment did not arrive when one party expected. The court decided that since the parties meant different things when they referred to the *Peerless*, the contract did not exist in the first place because no "meeting of the minds" occurred between the parties.

between Bartley and Mr. Morrison, the town drunk who is the father of Bartley's employee, Hannah Morrison. Mr. Morrison has a history of going on a drinking spree and then visiting the newspaper offices to negotiate for higher wages for his daughter. During these negotiations, Bartley "always assent[s]. . .to Morrison's demands," and, after "shaking hands," Morrison always leaves, declaring Bartley a "gentleman" (232). However, when Hannah Morrison returns to work, "the wages remained the same: neither of the contracting parties regarded the increase so elaborately agreed upon, and Morrison, upon becoming sober, gratefully ignored the whole transaction" (232). Their "negotiations" point to the difficulty in establishing the intention necessary to form a legal contract according to the classical model. In these exchanges, the promise does not matter at all because Mr. Morrison is drunk, and Bartley does not take the negotiations seriously.

The inability to establish intention becomes even more apparent when Morrison eventually visits the office to "convict" Bartley of "an attempt on Miss Morrison's affections" (235). Their discussion implies that both written and verbal evidence of intention may not provide adequate proof of intention. The scene unfolds like a courtroom drama, and both Bartley and Morrison sound like attorneys cross-examining witnesses. Morrison asks, "All I want to know is, What you mean? [sic]" (234). Bartley, however, refuses to answer directly and instead counters with another question: "What do I mean by what?" (234). Morrison tries to be more specific and asks again: "What do you mean. . . by praising her up so?" (234). When Bartley continues to answer Morrison's questions with more questions, Morrison tries a different tactic and introduces what he perceives as written evidence. First, he asks Bartley: "What's the word you sent

her by my boy, Sat'day night?" (234). Bartley responds in a way that again undermines the representational power of language: "That she was a smart girl, and would be sure to get on if she was good—or words to that effect. I trust there was no offense in that?" (234). Clearly, Bartley's answer can be interpreted in several different ways: Hannah may be able to "get on" if she does a "good" job as an employee; however, Hannah may also "get on" if she is "good" to Bartley in a sexual sense. By the end of the novel, the second reading seems most accurate because Hannah does end up as a prostitute, a point I will return to later in this discussion.

During his discussion with Bartley, Morrison eventually gets fed up with Bartley`s answers and produces evidence—a written note in which Hannah confesses that she loves "her love with an H" (235). Morrison then asks Bartley his initials in an effort to prove that Bartley is involved with Hannah. However, Bartley promptly answers "B" and again deflects the question, this time by pointing out that their witness, Henry Bird, has a "H" in his name (235). Morrison refuses to recognize the ambiguity Bartley plays on and, "with dogged iteration," states again "I want to know what you mean" (235). Perhaps because Bartley cannot think of another out, he turns to physical violence when he decides to "show" Morrison what he means and throws him out of the office (235).

After undermining the act of promising by calling into question the ability to represent intention through both the spoken and the written word, Howells points to another model of obligation when he highlights the duties owed to others that do not stem from promises. Indeed, tort law addresses duties owed to others according to law, such as the invasion of individual rights or the breach of a public duty, rather than private agreements. When Bartley gets rid of Mr. Morrison, Henry becomes upset so Bartley

asks "You don't mean to say you care anything for that girl?" (236). Henry responds immediately with "Don't come at me with your lies" as he shoves the newspaper he had been holding "into Bartley's face" (236). Henry's response suggests that both Bartley's statements and the newspaper he edits amount to lies, and once again, both written and spoken language seem suspect in their abilities to represent reality. As in his encounter with Mr. Morrison, Bartley finally relies on physical violence to show Henry what he means when language fails: Bartley "return[s] the blow as instantly as if Bird's touch had set the mechanism of his arm in motion" (236).

Bartley's response points to another source of obligation, the duty to others recognized by tort law, which attempts to account for obligations to others that cannot be adequately expressed in the language of classical contract theory. The altercation between Bartley and Henry throws into question the notion of intention and the notion that parties should be accountable only for what they intend to do. During the brief moment when Bartley thinks Henry is dead, Bartley judges his own actions and realizes that "the blow given for blow seemed the least part. He was not so wrong in that, as he was in what led to it" (237). Bartley sees his "follies" with Hannah as a major link in the chain of events that led to the present moment: "he knew he and not she was mainly culpable" (237). Thus, Bartley momentarily recognizes his obligations to Henry and to Hannah even though those obligations do not derive from consent or result from intentional actions alone.[10]

[10] In contrast to his sense of guilt in this moment of reflection, Bartley focuses directly on his lack of intent when he discusses Henry's injuries with others. As he explains to the doctor, "I didn't even intend to strike him when he hit me" (238). Similarly, his first words to Henry are simply "I didn't intend" (239), and he repeats the same phrase several times to Henry's mother and later to Squire Gaylord. However, the doctor

Squire Gaylord in particular suggests that the outcome of a particular action should be considered along with the intention to act itself. When Bartley comes to him for help with the "legal aspect of the case" (242), Gaylord immediately questions him with "the attitude of a lawyer cross-examining a slippery witness" (244). Bartley eventually reveals the details of the altercation as well as the events that led to it. Marcia Gaylord, now Bartley's fiancée, also listens to his story, and she supports Bartley until she hears about Hannah Morrison. At that point, she returns her engagement ring and leaves the room without asking Bartley anything about his relationship with Hannah. Though Gaylord admits that Marcia's decision amounts to "retroactive legislation" that runs "against one of the first principles of law," he does defend her by pointing out that Bartley misled both Marcia and Hannah (246). According to Gaylord, Bartley "knew. . .as much as a year ago" that Marcia loved him and encouraged her affection without really considering her feelings (246). Thus, for Gaylord, a common thread runs through Bartley's actions toward Henry, Hannah, and Marcia; in all three situations, Bartley fails to consider the outcome of a particular action. From Bartley's perspective, the Squire is "unjust," and the punishment itself seems "past all measure of his offense" because Bartley focuses on what he intends or promises rather than what actually happens as a result of his actions (247). Thus, according to Bartley's logic, Marcia has "no right to question his behavior before the engagement" because all her rights originate in the engagement and the promises they make about their future in that particular moment (249).

---

presents another view when he points out that "intentions have very little to do with physical effects" (238). Thus, intention alone seems an inadequate basis for obligation.

This logic persists even when Bartley and Marcia reconcile and decide to marry against her parents' wishes. Bartley continues to focus on what he had promised or intended as the only source of his obligations to others. He admits that he "made love to Hannah Morrison," and though he "never promised to marry her," he did make her believe that he "was fond of her" (292). Bartley again emphasizes what he did not promise even at the same time that he seems to admit some culpability. Marcia also focuses on her promise to Bartley and admits "I broke my promise" that "I would never think of anything that had gone on before that [the engagement]," even though, as she confesses, "I was bound to you by my word" (292). Bartley, in turn, tells Marcia, "If you want me to be good, you must be kind" (298). In response, Marcia makes another promise: "I will never say anything to you for anything that happened after I behaved so to you" (298). Thus, for both Marcia and Bartley, the promise continues to represent the primary source of obligation to others at the same time that it cannot secure consistent self-representation over time.

Their marriage ceremony undercuts the importance of promising much like the opening scene undermines individual will as a justification for obligation. Howells does not dramatize the marriage proposal or the marriage ceremony. Instead, Bartley merely states, "We are going to get married" (293), and Marcia does not verbally consent. Similarly, the minister "contrived to make them man and wife and to give them his marriage certificate" (294). When the minister seems confused, as if he has forgotten something, Bartley pays him for his services, and that is the end of the matter. As Bartley explains it, "I gave the minister five for you—I think you are worth it" (297). However, near the end of the novel, when Bartley and Marcia contemplate divorce, the marriage

ceremony becomes a major point of contention because Marcia does not realize that the minister never asked for "proof" that they "had declared" their "intention to get married" (468). Thus, Marcia later comes to believe that the marriage was "tainted with fraud from the beginning" (468). Even though they receive written confirmation—the marriage certificate—that the marriage is legal, for Marcia, the marriage is defined by the verbal exchange of vows that apparently did not address intent.

Howells further explores obligation when he investigates the terms of a newspaper's contract with the public and the obligations that flow from that contract. When Bartley and Marcia move to Boston after their wedding, Bartley attempts to find work with a newspaper, and to facilitate that attempt, he writes an "account" of a logging camp he visited near Equity and draws on an interview with Kinney, a logger in the camp. As Bartley struggles to place the story, he encounters two seemingly different views of what a newspaper should do for the public: "counting room" journalism that operates according to market-oriented logic and its more ethically oriented counterpart, a form of journalism that attempts to transcend the market.

First, Bartley encounters "counting room" journalism, associated with the *Daily Events*, designed to sell papers and nothing more (318). Bartley initially believes he can sell the story about Kinney to the *Daily Events'* editor Mr. Witherby, who expressed interest in Bartley's work when they met at the logging camp, but Witherby declines the offer. Bartley learns that Witherby had fired his managing editor "for his neglect of the true interests of the paper as represented by the counting room" (318). Not to be daunted, Bartley goes to the *Daily Events* competitor, the *Chronicle Abstract*, edited by Mr. Ricker, and sells the story after he explains that the *Events* plans to write the same kind of

piece. Encouraged by this success, Bartley writes another story based on Marcia's suggestion that he describe how hard it is to find a room to rent in the city. Much like the way he approached the logging camp story, Bartley again builds on the facts: he "gathered all the facts he could" and created "a spicy sketch" in accordance with a kind of contract with the readership (327). Such an "expose'" appeals to the "public" because "it seems to be made in the reader's own interest; it somehow constitutes him a party to the attack upon the abuse, and its effectiveness rebounds to the credit of all the newspaper's subscribers" (328). Here, the appeal comes from a sense of identification between the readers and the writer, and the reader becomes a "party" through a kind of meeting of the minds. In writing both pieces, Bartley carefully considers what readers will buy papers to read, and in both instances, the *Chronicle Abstract* buys his work.

However, despite the attention to what readers want, Ricker presents the *Chronicle Abstract* as the antithesis of the "counting room [that] was running" the *Daily Events* (331). Ricker believes that "a newspaper is a public enterprise with public duties" (414), and these duties depend on something like a social contract between the newspaper and its employees. Indeed, Ricker invites Bartley to attend the club, a place where, as Ricker describes it, "We're all newspaper men together" (329). The description of the newspaper men and their relationships to their newspapers alternates between aristocratic and democratic conceptions of social relationships. For these men, the paper is "as dear as his king once was to a French noble; to serve it night and day. . .was the loyal devotion which each expected his sovereign newspaper to accept as its simple right" (330). Thus, the newspaper represents a kind of sovereign authority while the newspaper men appear as the sovereign's subjects. Yet, in the same scene, a more democratic version of social

relationships also emerges; it is "with American eagerness to recognize talent" that many "good fellows" compliment Bartley on his recent publications (331). In fact, the men are so impressed with Bartley that they nominate him for membership in the club, and Bartley is democratically selected through a vote, even though he joins a newspaper man's aristocracy. The club represents an idealized form of organization: "in this civilization of ours, grotesque and unequal and imperfect as it is in many things, we are bound together in a brotherly sympathy unknown to any other" (332). Thus, the bond of "brotherly sympathy" creates a kind of democratic aristocracy that sees itself as superior to the market-driven "counting room" approach to journalism. These newspaper men are obligated to the sovereign and not the market.

However, the market continues to be an important factor for the Hubbards, and Bartley looks for a traditional employment contract as a way to achieve some sense of financial security.[11] Much to Bartley's surprise, Witherby eventually offers such a basis, and Ricker encourages Bartley to accept (348). Bartley accepts the salary with the knowledge that Witherby "should not like" him to do "any work outside the *Events*" (354). Bartley also agrees with Witherby's approach to running a newspaper. According to Witherby, "the first duty of a public journal is to make money for the owner," noting that even churches should be on a "paying basis" (351). Bartley immediately agrees and points out that "unless it [a newspaper] makes money, there can be no enterprise about it, no independence, --nothing" (351). Thus, Witherby and Bartley agree that the newspaper man must listen to "the counting room" (352).

---

[11] Despite his success as a freelance writer, Bartley continually needs more money because they tend to spend more as his earnings increase, so one of his goals is to acquire a salaried "basis" with one of the newspapers (348) even though Marcia believes he "should go on with the law" (339).

At first glance, the *Daily Events* and the *Chronicle Abstract* seem to run according to quite different principles. The *Daily Events* caters to the demands of the market while the *Chronicle Abstract* concerns itself with public duties and, more generally, a kind of moral high ground that transcends the concerns of the market. For instance, Ricker criticizes Witherby for running the newspaper as if "the press is a great moral engine, and that it ought to be run in the interest of the engineer" (414). However, when Bartley asks Ricker if he believes that "it [a newspaper] ought to be run in the interest of the public," Ricker replies "Exactly—after the public has paid" (414). Like Witherby's "counting room" approach, Ricker's contention that the public should pay also reveals a market driven logic at work. This logic is apparent in the material the *Chronicle Abstract* prints. Though Bartley claims that "nobody should buy or sell" him and that "the advertising element shouldn't spread beyond the advertising page," Bartley sells articles whose subject matter reflects the shift from production or property-driven market interest to consumption as an emerging market force (416). His first piece reflects a real property-driven economy as it describes the logging industry and provides "a politico-economical interest" by discussing the loggers and the industry itself (317). The next piece explores the search for adequate housing in Boston and exposes the "exorbitant demands" of Boston's landladies (328). Both pieces relate to property ownership and earnings derived from that property. The pieces that follow focus solely on consumption and amount to advertisements disguised as articles. For the *Chronicle Abstract,* Bartley covers "the spring openings of the milliners and dry goods people" (334) and develops a series of articles on "easily accessible hot-weather resorts" which describes "sea side hotels and their surroundings" (335). While researching these articles, Bartley and Marcia are

"treated with the hospitality which a knowledge of Bartley's mission must invoke" (335). For Bartley, the implicit exchange of hospitality for a favorable article is "a matter of business, give and take on both sides, and the landlords took more than they gave in any such trade" (336). Describing these transactions as "give and take on both sides" operates to mask the true nature of such exchanges by making them seem like gifts and thus acts motivated by altruism rather than self-interest. Here, the hospitality is really a payment for a favorable piece that will effectively advertise the location to the paper's readers, and Ricker ignores this aspect of the profession when he argues for a newspaper that is somehow above market forces.[12] Indeed, it is Ricker who gets tickets for Bartley to attend a fundraiser for the Indigent Children's Surf Bathing Society, even though the tickets are, according to Ricker, "hard to get. . .for love or money,--especially love" (341).

The newspaper business also enables the consumption of bleeding and broken people. For instance, Ricker laments the "intense localism" of the news and asks: "Why should I be told by telegraph how three Negroes died on the gallows in North Carolina?. . .Why should I sup on all the bleeding horrors of a railroad accident, and have the bleeding fragments hashed up for me at breakfast?" (416-17). Ricker's last question is particularly interesting as it suggests a cannibalistic logic of consumption of people mediated by the newspaper. Again, Howells situates cannibalism within civil society

---

[12] Similarly, Bartley's piece on the event raises issues about the conflation of gift and exchange. The article advertises a charity event to raise enough money so "that ten thousand poor children could be transported to Nantasket Beach, and there. . .bathed, clam-baked, and lemonaded three times during the summer at a cost so small that it was a saving to spend the money" (341). Rather than addressing the material conditions that create poor children, charitable gifts provide for poor children to be bathed, baked, and lemonaded so as to make them palatable objects of consumption for their benefactors. Indeed, the children are consumed by a cannibalistic logic that depends upon the appeal of seemingly altruistic acts.

rather than outside it. The logic of consumption becomes even more apparent when Bartley visits a restaurant where the manager is discussing how he decides what to offer on the menu. The manager explains that he just added chicken legs to the menu because "that's what the public wants" (418). Bartley is "struck" by these ideas "in their accordance with his own ideas for journalism" (418), and he points out that "it's just so with the newspapers, too" (419). Interestingly, the manager's response situates Bartley's ideas in terms of both literary and legal practices: "If the public don't want Shakespeare, give 'em burlesque till they're sick of it. I believe in what Grant said: 'The quickest way to get rid of a bad law is to enforce it'" (419). The manager's comment links the use of force to the operation of law and implies that force also plays a role in literary production and consumption.

Literary and legal practices again collide when Kinney, the logger from Equity, visits Bartley and Ricker. When Kinney explains that he would like "to write it [his life] out and do something with it," Ricker immediately "promise[s] to take it for the Daily Events" while Bartley rushes to counter by claiming that "that narrative—'Confessions of an Average American'—belongs to the Events" (460). Ricker then turns to the legal implications of the situation and asks Kinney "What's to prevent our interviewing you on this little personal history of yours, and using your material any way we like?" (460). For Kinney, this is a non-issue because he is "amongst gentlemen" (460). Later, Bartley, facing a "sheaf of unpaid bills" (463), writes Kinney's life story and offers it to Ricker. When Ricker points out that Kinney "was going to use the material himself some time," Bartley dismisses his concern because Kinney "can't write any more than a hen" and

"nobody would print 'em, much less buy 'em" even if Kinney did write his story (464). Bartley also notes that his treatment of the material would not "hurt the material for his [Kinney's] purpose" and that Kinney would "be tickled to death when he sees it" (464). Ricker eventually agrees to accept the piece and to pay fifty dollars because Bartley claims he "can't afford to do a dishonorable thing for less money" (465).

At issue in this series of agreements is the ownership of Kinney's life story. Indeed, Bartley sees his revision as providing some sense of ownership because he rewrites Kinney's story so as to facilitate its consumption by the public. However, Marcia sees ownership in more absolute terms; Kinney's life can be stolen in the same way that an object can be stolen. When she sees "Kinney's life all written out," she immediately concludes that "that thief [Ricker] has stolen it" (465). Though Bartley admits that he wrote the story, he defends himself by relying on two contradictory accounts of ownership. First, he defends his actions on the grounds that Kinney's story can be recycled and consumed all over again: "six weeks from now nobody will remember a word of it; and he could tell the same things right over again and they would be just as good as new" (466). Thus, according to this logic, Kinney's story can be recycled in a way that negates notions of property ownership evidenced by a legal title to an object, and, as a result, Bartley owes no obligation to Kinney because the story cannot be owned in any absolute sense.[13] However, Bartley also relies on a view of a contract as a discrete transaction, a view that depends on a static definition of ownership. He points to a legal justification for his actions by connecting Kinney's story with what he told

[13] Howells' Editor's Study columns about copyright law discuss the ownership of literary production from the standpoint of the author rather than the source for the content of the story.

Bartley when Bartley visited the lumber camp: "There was hardly anything in his rigamarole the other night that he hadn't told me down there in the lumber camp, with full authority to use it in any way I liked; and I don't see how he could revoke authority" (467). In this account, Bartley's obligations to Kinney derive from their initial agreement about how Bartley would use the material Kinney provided to him; that is, his obligation to Kinney seems static and fixed by a single exchange. Indeed, this exchange fixes their relationship for the future and provides Bartley the right to use Kinney's life story whenever he wants. This view depends on the contract creating for Bartley a property right to Kinney's story; that is, Bartley owes no further obligations to Kinney because Bartley, in effect, owns the right to the story.

However, for Marcia, Bartley's obligations to Kinney are not so easily explained away; indeed, she senses that Bartley and Kinney did not intend the same thing at any point in these exchanges. She immediately relates the incident with Kinney to their marriage: "there can't be anything sacred in our marriage unless we trust each other in everything" (468). As I mentioned earlier in this chapter, it is at this moment that Marcia learns that their marriage is "tainted with fraud" because the minister did not "ask for proof" of their "intention to get married" (468). Written evidence (the marriage certificate) is inadequate because it cannot demonstrate intention and thus ground obligations to each other. As Bartley puts it, "We are married, right and tight enough; but I don't know that there's anything *sacred* about it" (468 emphasis in original). Marcia realizes that their marriage contract, like Bartley's agreement with Kinney, does not represent a common intention or a common understanding of their obligations to each

other. The marriage contract also seems problematic for Marcia because it exists only on paper.

The only contractual bonds, then, that seem to carry public obligations are the marriage contract and an implied contract between a newspaper and its readers. Both contracts are conspicuously in or about writing and lack verbal manifestations of intention, and both are associated with moments of violence. In the first instance, which occurred when Bartley lived in Equity, Bartley hits Henry, and the newspaper is Henry's weapon. The second instance, which I will discuss in a moment, occurs when Witherby argues with Bartley and hides behind a newspaper before Bartley pushes it away as Witherby urges him not to turn to violence. Both of these moments of violence are also linked to the marriage contract; the first incident plays a role in Marcia's decision to break the engagement because the fight itself was about Hannah Morrison, and the second incident is a part of the series of events, culminating with Hannah Morrison's reappearance, that causes Marcia to leave Bartley.

Obligation is also at issue when Witherby confronts Bartley about publishing the piece about Kinney in the *Chronicle Abstract.* Witherby believes that Bartley breached a contractual obligation to the *Daily Events* by selling the piece to a competing paper and indicates that he thought their "contract covered contributions as this" (469). However, Bartley views their obligations differently and argues that he wrote the piece on his own time and that the newspaper owns him only during regular working hours: "I wrote it out of time, and on Sunday night. You pay me by the week, and all that I do throughout the week belongs to you" (469). Though Bartley did agree that he would not write for other papers when he went to work for the *Daily Events*, Witherby does not point this out;

instead, he tells Bartley that "if this is to be your interpretation of our understanding for the future, I shall wish to revise our contract" (469). However, such a revision of the terms never occurs because Bartley threatens to write a piece for Ricker about "counting room journalism" (470). Bartley's threat secures his position only briefly. When Witherby finds out that Bartley "used material. . .which had been entrusted" to him "under a seal of confidence" and that he allowed Ricker to take the blame for writing the story when Kinney found out, Witherby dismisses Bartley (479). Witherby justifies his decision: "such a report reflects through you upon the Events; it reflects on me" (479).

In an interesting moment that mirrors Bartley's earlier confrontation with Henry Bird and the circumstances of his departure from Equity, Witherby ignores Bartley by pretending to read a paper until Bartley "struck it out of his trembling hands" (480). When Witherby appeals that there be "no violence here," Bartley merely laughs and points out that he "should have to touch" Witherby in order for "violence" to occur (480). The near violence of this encounter is reminiscent of Bartley's fight with Henry Bird; indeed, during that encounter, Henry hits Bartley with a newspaper, and Bartley does more than "touch" Henry. He hits Henry hard enough to knock him down and cause him to hit his head with enough force to knock him out. In both instances, the newspaper is associated with violence. In both the Bartley/Henry altercation and the Bartley/Witherby altercation, physical violence further illuminates the violence of consumption of the news and of people. The subject of Henry and Bartley's disagreement, Hannah Morrison, reappears at precisely the moment when Bartley's relationships with Witherby, Ricker, and Marcia reach the breaking point. Hannah, the text implies, is now a prostitute. Marcia, already upset about Bartley's use of Kinney's story, accidentally encounters

Hannah on the street. When she asks Hannah "how she came to that," Hannah, also turning to physical violence, slaps Marcia and tells her to ask Bartley (489).[14]

The sanctity of contractual obligations becomes an issue when Howells explores divorce as an option for Marcia. After two years with no word from Bartley, Ben Halleck, who is in love with Marcia, argues that she should have "the right to be free" (538) because "marriage has no sanctity but what love gives it" (539). For Ben, love is "a law to itself, able to loose and to bind" (539), that provides external justifications for the obligations defined by law; indeed, Ben defends controversial divorce laws on the grounds that they are justified both by the letter of the law and a sense of justice located somewhere outside law. However, Atherton refuses to recognize Ben's appeal to the law of love and freedom; instead, he views such a right as "poison" because through its exercise Ben would have to rely upon "the shelter of our infamous [divorce] laws" (539). Atherton, though, must also turn to something outside the letter of the law to justify his position. Indeed, he implies that certain moral precepts demand that divorce should not be recognized under the law. Both Ben and Atherton's claims highlight the role of the state in defining obligations. The state has a specific role in terms of the legal consequences of contractual relationships. Indeed, the state must decide whether contractual obligations, however they are defined, should be enforced, and in this way the

---

[14] Hannah's reappearance also links prostitution and marriage; both involve women and can be described in contractual terms. Indeed, as Pateman points out, "contractarians argue that a prostitute contracts out a certain form of labour power for a given period in exchange for money" (191). In keeping with her critique of the social contract and the construction of the sexual contract, Pateman also suggests that "once the story of the sexual contract has been told, prostitution can be seen as a problem about *men*" (194). Within their institutional structures, both prostitution and marriage involve the subordination of women to men (194).

state no longer seems the neutral enforcer of what the parties promised when they entered their contract.

While Ben and Atherton debate the theoretical application of law, Bartley turns to its practical application when he files for divorce in Indiana, presumably a state with liberal divorce laws. Ben only accidentally sees a newspaper with the public notice that Marcia needs to appear in court. Interestingly, Ben refers to the notice as an "advertisement," and despite his own legal training, the meaning of the document is not readily apparent to him. As Ben explains it, "he saw the familiar names, but they were hopelessly estranged by their present relation to each other; the legal jargon reached no intelligence in him that could grasp its purport" (544). The document, which Howells provides in full, indicates that Bartley is suing Marcia for divorce on "account of abandonment and gross neglect of duty" (544). Here, the newspaper serves a public function by providing notice, but, by linking notice and advertising, the scene also suggests again the problematic relationship between law and consumption.

The divorce trial, in turn, brings to light the state's role in enforcing contractual obligations. According to classical contract theory, the state plays a neutral role in enforcing contracts because it simply forces the parties to do what they originally agreed to do, and this logic suggests that the law would not sanction divorce. However, the law clearly does allow for divorce under certain circumstances, and, therefore, the law, in this instance, is no longer neutral with regard to the original contract. The marriage contract further complicates this account because Marcia's contractual obligations are reconceived as social duties. As Atherton explains, "there are a great many things that are not wrong except as they wrong others," and legally sanctioned divorce is clearly one of these things

(554).[15] For Atherton, divorce represents not only a "crime" against Marcia but also "against society" (554) Similarly, Marcia's father, Squire Gaylord, points to her "duty" to fight the divorce (551). Even Ben Halleck, who initially wanted Marcia to divorce Bartley, changes his position when confronted with the prospect of a trial and claims that Marcia must contest the divorce because she has a "public duty" to "keep him [Bartley] bound" to her lest "society be broken up and civilization destroyed" (568). The marriage contract, in essence, provides the very foundation for social organization, and to contest that bond is to call into question the social order itself.

Ironically, the trial itself parallels a marriage ceremony when Marcia appears "veiled" and Squire Gaylord begins his legal defense not by focusing on the law of divorce but by asserting that he is "sacredly privileged to demand justice" for his "own child" (578). Like Marcia and Bartley's marriage ceremony, the trial also highlights the relationship between sacred bonds and language in claims for justice. Bartley and Marcia's marriage contract is not, ultimately, a sacred bond because it is only in writing and lacks a corresponding verbal manifestation of intention. Similarly, a newspaper is only writing, so its sacred bond with the public also seems suspect. Both spoken and written language fail in the trial scene. For instance, Gaylord is unable to write a motion; after "a futile attempt to prepare the paper," "the pen flew out of his trembling hand," and he claims, "in despair," "I can't write" (576). After an eloquent opening statement that causes listeners to "cluster. . .about in keen appreciation of his power" (579), Gaylord "demand[s] under. . .law the indictment of yonder perjurer for his crime" (580). Indeed,

[15] Interestingly, the Athertons' marriage is described in even more contractualized terms than that of the Hubbards. Atherton was initially Clara's business advisor, and after a disagreement about his role as

Gaylord's "words had an iron weight" and "fell like blows" (580). Marcia, who once imagined the trial as an opportunity for "public reconciliation" (563), "murmur[s]. . .from behind her veil" and finally speaks; she tells the court, "I didn't understand! I never meant to harm him! Let him go! It's my cause, and I say—" (581). Marcia's speech is cut off when Gaylord collapses due to a stroke and loses all his language abilities.[16] The trial scene ends with Gaylord's collapse, and Howells does not directly represent the court's judgment.

Howells does, however, use the newspaper to describe what happens to Squire Gaylord and Bartley Hubbard, and, not surprisingly, both end up in stories to be consumed by the public. For instance, "the common report" reveals that Gaylord died after suffering two more strokes after returning to Equity (585).[17] After the trial, Bartley apparently headed west to start a newspaper in Whited Sepulchre, Arizona; according to the "press of the State," he began with a "spicy" "Sunday edition" 586). However, when he writes about "the domestic relations of 'one of Whited Sepulchre's leading citizens,'" the "leading citizen. . .took the war-path," and the outcome was "the fatal case of shooting" (586). The author of the newspaper account also mentions that "Mr. Hubbard

---

advisor, Atherton agrees to resume relations with Clara on his "terms" that she marry him (530). Clara "accept[s] the conditions" and finds "nothing incongruous in the transaction" (531).

[16] Bartley takes the opportunity to escape during the chaos and is "saved from the penalty of his crime [perjury] by the refusal of his wife to press her case" (584). However, Bartley later claims that "the law" cannot "touch" him with regard to his actions (582).

[17] Though Gaylord does manage to return to Equity, he never regains his abilities. Indeed, he sits in his old office with Flavia, "who often built houses with his law books on the floor" (584).

leaves a (divorced) wife and child somewhere at the East" (586). Bartley himself thus ends up a spicy tidbit in a newspaper story about his violent death.[18]

The novel ends with the possibility of another marriage contract in the future. Ben Halleck contemplates proposing to Marcia when he learns of Bartley's death and, perhaps because he, like the Holmes court, believes that men should not pass on their own conduct when it affects the lives of others, turns to Atherton for advice. Ben asks, "She is free now; but am I free? Am I not bound by the past to perpetual silence?" (587). Here, Ben echoes Howells' invocation of the "promise" of "past performance" in the prospectus for the novel, and Ben's statement follows the same logic. He suggests that ties to others have a history and that such ties, like contracts, can bring past and future into the present moment to secure consistent self-representation over time. However, the self he proposes is one characterized by silence. When Atherton discusses the situation with his wife, Clara reminds him that he once said that "the will didn't count," a claim that suggests the irrelevance of intention in defining obligations; thus, judgments about obligations are not neutral (588). Indeed, during an earlier discussion of the possibility of divorce, Atherton claims that "We're all bound together. No one sins or suffers to himself in a civilized society, or religious state—it's the same thing. Every link in the chain is made to feel the effect of the violence more or less intimately" (556). Atherton's claim, like that of the nineteenth-century courts that posited drawing lots as the only way to justify cannibalism or other forms of violence to others, highlights the violence inherent in the formation and continuation of civil society and the state. Faced with this violence

[18] In *The Social Construction of American Realism,* Amy Kaplan argues that Bartley "enacts the demonically violent urge lurking in Howells' 'Aesthetic of the Common'" (38). Howells, then, must turn "this violence against Hubbard himself to protect realism from its own aggression" (38).

that, as the earlier discussion of cannibalism suggests, is both willed and unwilled, Atherton reaches the limits of representation.[19] Indeed, he cannot define or describe Ben's obligations. When Clara asks what Atherton plans to "write" to Ben, Atherton can only reply, "I don't know! I don't know!" (589). Since judgments can no longer be described as neutral, Atherton can only defer judgment (and the obligation to judge) to a moment in the future that may never arrive.

Howells' account of obligation in *A Modern Instance* suggests, then, that individual identity is constructed, at least partially, through relationships with others. When Bartley imagines drawing lots to determine who he will eat for dinner, he also imagines himself in control of the process; he draws lots on behalf of the participants and ensures his own survival. Alongside this vision of ultimate autonomy, Howells constructs moments of violence, such as cannibalism and a cannibalistic logic of consumption, that call up the violence of the social contract and, by extension, other contracts as well. Howells' novel also counters the logic of the nineteenth-century courts that focused on procedural fairness as a way to temper the autonomy Bartley imagines; these cases emphasize the decision to participate in the process of drawing lots rather than the outcome of the process. By linking consumption and violence through the metaphor of cannibalism, Howells focuses attention on the outcome rather than the process and suggests that the boundary between willed and unwilled obligations is not a clear one. Thus, individual autonomy can no longer be described in the way Bartley or the nineteenth-century courts imagined. Indeed, for Howells, individuals sometimes act

---

[19] Kaplan suggests that for Howells, "the democratization of literary representation was. . .a contradictory struggle to form bonds between members of antagonistic social classes" (22).

autonomously and sometimes not, and this ambiguity captures the model of agency classical contract theory creates. Though classical contract theory presumes autonomous agents who define themselves by choosing their obligations, the theory essentially rests on a fundamental tension between contract as a technology of autonomy and contract as a stabilizing, sometimes violent, force that frustrates self-realization. Thus, any sense of agency involves negotiating this range of possibilities. In order to understand further Howells' notion of agency as a negotiation of a range of possibilities, I will now turn to *A Hazard of New Fortunes.*

"Gifts for Gifts Back Again": Bargaining and the Individual in William Dean Howells's *A Hazard of New Fortunes*

Near the midpoint of *A Hazard of New Fortunes*, Margaret Vance and Mrs. Horn discuss the basis of society and the motives for the actions of its members. Margaret characterizes society as a "painted savage" and states that "all its favors are really bargains. Its gifts are for gifts back again" (218). Margaret Vance's statement implies that gifts are not really gifts at all but are, instead, part of an exchange that creates obligations on both sides; the image of a "painted savage," in turn, calls up troubling images of the settlement of America through conquest at the same time that it suggests that the boundary between civil society and a state of nature inhabited by "savages" is not a clear one. The idea that gifts are really exchanges persists throughout the novel. For instance, Fulkerson echoes Vance's assumption when he claims that *Every Other Week* will be a "gift" to the public: "We don't intend to sell 'em – it's no name for the transaction -- but to give 'em" (120). However, the public will pay for the magazine; in

Fulkerson's terms he will "give" the public "a better article for the price" (120). Fulkerson also imagines that *Every Other Week* will be the embodiment of a democratic aesthetic space that "amounted to something in literature as radical as the American Revolution in politics; it was the idea of self-government in the arts" (183). However, this democratic space, as I will demonstrate, is, in fact, created through a series of individual employment contracts that often destabilize the union of artists Fulkerson envisions. These employment contracts highlight the ways in which material conditions limit the hypothetical freedom promised by the social contract as well as the legal contracts that follow its logic; indeed, Howells describes all of the relationships in the novel in terms of exchange.

As critics have noted, Howells was deeply troubled by the changing economic climate of the late 1800's. In a letter to Edward Hale dated August 30, 1888, Howells laments the current state of civilization: "At present it seems to me that our competitive civilization is a state of warfare and a game of chance, in which each man fights and bets against fearful odds" (3: 229). This sentiment is echoed in a famous letter to Henry James dated October 10, 1888. Howells states:

> I'm not in very good humor with "America" myself. It seems to me the most grotesquely illogical thing under the sun; and I suppose I love it less because it wont [sic] let me love it more. I should hardly like to trust pen and ink with all the audacity of my social ideas; but after fifty years of optimistic content with "civilization" and its ability to come out all right in the end, I now abhor it, and feel that it is coming out all wrong in the end unless it bases itself anew on a real equality. (3: 231)

Howells also implies that law is at least partially to blame for this state of affairs in the February 1890 "Editor's Study." As Howells argues,

> The legal right of one man to luxury through the misery of another is questionable; and it is comically, it is tragically futile to tell people not to get gain, and take advantage, when the wayfaring man can see that these are the very conditions of success, and of mere bread and meat, in society constituted as it is. (240)

These, and many other similar statements, reflect Howells' concern with social conditions and his struggle to determine the extent of individual and social responsibility for those conditions.

Many literary critics characterize *A Hazard of New Fortunes* as William Dean Howells' response to economic forces as determiners of the state of society. For instance, George Bennett considers it an "economic" novel through which Howells calls his readers to social action. Kermit Vanderbilt argues that in it Howells addresses "some of the basic social, economic, and moral problems of capitalism" (146). Similarly, Timothy Parrish contends that "the final transformation of American society from an agrarian economy into a free market oriented corporate capitalism" played an important thematic role in the novel ("Howells Untethered" 101). Walter Benn Michaels goes even further by suggesting that Howells actually feared capitalism because it "acted more to subvert the ideology of the autonomous self than to enforce it" (51).

Most critics, however, do not address the interrelationship between economic conditions and contract law in *A Hazard of New Fortunes*. Indeed, the novel clearly reflects Howells' awareness of the role of contract in both legal and ethical relationships,

and given the economic conditions Howells presents, the novel offers a problematic account of agency. As my earlier review of Howells' personal letters suggests, Howells often played an active role in his own contractual negotiations and certainly recognized the ways in which contract law enabled him to define himself as a writer as well as to limit that self-definition. Before turning to the novel, it is important to consider the state of contract law in the late nineteenth century. As I mentioned in the introduction, in the late nineteenth century, classical contract seems to provide a way to balance the demands of the past, present, and future, and to provide insurance against the risks inherent in a changing market. As Lester Lindley suggests, most Americans remain rooted in the present, imagining a "future that beckons but never arrives" (281). By offering temporal continuity, contract theory "permits a limited measure of self-transcendence as individuals use their vision of what it might be to pull themselves from their present circumstances" (281).

Howells's novel explores this possibility of the "self-transcendence" through contract. The novel opens, in fact, with a contract on the table; the society of bargaining later articulated by Margaret Vance is introduced in the very first sentence in which Fulkerson urges Basil March "to think this thing over" (7). The "thing," we will later learn, is an offer of employment as the literary editor of a new type of magazine, a magazine whose contributors will be "paid according to sales" so that they can "share the profits" while remaining "exempt from the losses" (10).[20] However, despite this emphasis on economic terms, Fulkerson claims that the magazine will represent much

[20] Put another way, the magazine will "pay authors and artists a low price outright for their work, and give them a chance of profits in the way of a percentage," a scheme which amounts to speculation on art in the same spirit as the stock speculation that increases Jacob Dryfoos's already substantial fortune (17).

more: an opportunity for true freedom. Fulkerson envisions artists "breaking loose from the bondage of publishers" (11) in what he later characterizes "the culmination of all the high and ennobling ideals of the past" (191).

Fulkerson incorporates this vision of freedom into his most persuasive argument. Offering March not just a contract for employment but an opportunity to do what March seems naturally meant to do, Fulkerson argues, "You ain't an insurance man by nature. You're a natural-born literary man; and you've been going against the grain" (7). Citing "some kind of necessity or determinism which runs through things," William McMurray points out that the "implication is that March, somehow, is meant to be a literary man" (69).[21] Fulkerson's side of the bargain, then, seems to be a gift of monumental significance: March can now develop his true identity. However, in exchange for this possibility, March must agree to serve as the literary editor. Fulkerson thus focuses on the ability of art to establish connections; indeed, a few verses that March once published in a newspaper, and that Fulkerson carries in his pocket, "formed an immediate bond of union between the two men when their authorship was traced and owned" (23). Similarly, March believes that his own aesthetic sensibilities, his "democratic instincts," allow him to do "full justice to the good qualities of those other people" who lack his instincts (24). According to March, the main reason he has not pursued a literary career is due to his "high altruistic aim" to "provide well for his family," among other things (24).

---

[21] However, critics like McMurray and others fail to note that March, despite his eventual acceptance of Fulkerson's offer and his own admission that "it was more an accident than anything else" (8) that he entered the insurance business, acts more like a "natural-born" insurance man than a literary editor as the novel unfolds.

Because Basil is defined through his work, his previous occupation as an insurance man becomes particularly significant. Insurance itself is a bargain of sorts, a contractual agreement in which a party agrees to pay premiums in exchange for the insurance company's promise to compensate the party for certain kinds of damages which may occur in the future. Essential here is the function of insurance as a hedge against future risks; almost all forms of contracts, according to classical contract theory's emphasis on contracts as executory, can be viewed as planning tools that provide insurance against future risks that the contracting parties attempt to foresee and to provide for. Further, while employed by "Reciprocity Life," March is not only an insurance man; he is a life insurance man (20), and, throughout the text, he searches for life insurance of one form or another as he faces increasingly uncertain economic conditions.

The risks associated with the speculative economy are apparent as early as March's discussion of the offer with his wife, Isabel, who complains that Fulkerson is always "wanting to chance things" (16), though she finally concedes that "it's a risk keeping on as we are" because March might lose his job at the insurance company (25). Both Isabel and Basil March look at the future fearfully as an element beyond their immediate control, and both eventually view March's employment contract with Fulkerson as a hedge against future change. March's acceptance of the offer, then, comes not because March wants to be "literary," but, instead, because March fears losing his old job. Fulkerson's offer becomes insurance that provides security against uncertain economic conditions.

This fear of change becomes even more apparent after the Marches decide to move. Ironically, March's decision to accept Fulkerson's offer causes the Marches to move to New York so that, in this instance, contract precipitates change rather than securing the present circumstances. Confronted with "the uprooting and transplanting" of the family to New York, Isabel March "trembled before distant problems and possible contingencies" (32) because past, present, and future are no longer consistent. For March, the future is "easy in the mass, but terrible as it translates itself piecemeal into the present" (33). Both Basil and Isabel need links to the present that will provide the security they need to face the future. March attempts to assure himself that the future is secure by leasing their Boston home because a lease, lacking the permanence of selling, "implied their return to it" (33). Similarly, March derives security from his marriage contract with Isabel because the real property that Isabel owns outright, and the rental income it generates, provides their only real insurance against economic risk; as March later puts it, "people don't starve on two thousand a year, though it's convenient to have five" (21). For March, Isabel's property ownership provides insurance; property ownership, and by extension self-ownership, suggests an illusory permanence of present relations and conditions so that the terrible future never arrives.

When the Marches arrive in New York, they immediately begin an extended search for appropriate housing which introduces a different type of contractual relationship, the lease, as a point of contrast to the absolute ownership of their Boston home. While many critics denounce this section as a mistake by Howells, the apartment hunt introduces the Marches to the market economy, reiterates the orientation toward contract implied in the opening chapter, and illustrates the shift from tangible to

intangible property. Howells describes the Marches' arrival in New York in terms of conquest that reinforce Margaret Vance's allusion to "painted savages." March explains to Fulkerson that he "burnt" his ship and is "anxious about the disposition of the natives," and Fulkerson points out that he "has been round amongst the caciques" and that the natives are "an awful peaceable lot" (38). This market, unlike markets based completely upon speculation which appear later in the text, still maintains a connection to ownership because property owners and developers create available apartments and set the prices.

As the Marches begin their search for the "ideal furnished flat" (39), their inexperience becomes apparent when Isabel suggests that they can afford to pay "very good rent" while saving "something" on the lease of their Boston home (37). Isabel concludes that the rent "must not be over eight hundred dollars for the winter," and even then, they "must save something out of that so as to cover the expenses of moving" (39). The second apartment they view, a flat owned by Mrs. Grosvenor Green, seems affordable, despite its other shortcomings, as the Marches believe that the rent is two hundred and fifty dollars for the winter. Isabel "mentally saved five hundred dollars as the difference between the rent of their house and that of the flat" until they realize that the amount is for the month instead of the entire winter (44). However, they make no attempt to bargain for a lower rent, stating instead that the flat is too small while hoping that they made the manager believe "it was the smallness and not the dearness" that caused their refusal (44).

Despite their actions to the contrary, the Marches should understand better the nature of bargaining after leasing their Boston home. When March chides Isabel for asking a "scandalous rent" for their home, she reveals that "the agent told her to ask

fourteen hundred" and that despite the high offer, they "didn't get much more than half" when the house was actually leased (46). The Marches should realize, then, that prices are intentionally set higher so that the parties can negotiate, but, unfortunately, neither Basil nor Isabel is a very good bargainer.[22] Instead, their actions reveal a continued belief that they can give an owner a specific dollar amount and receive in return a flat that meets their exact requirements. After a wasted day pursuing the leads of agents, Basil merely comments, "there seems to be something in the human habitation that corrupts the natures of those who deal in it, to buy or sell it, to hire or let it" (45). Basil comes to realize that the market does not work according to his or Isabel's specifications and instead operates on the assumption that "if you can't get what you want, you will take what you can get" (45). He attributes this premise to the corruptibility of human nature rather than to a market controlled by ownership because the people who own real property control the available options.

Basil's assumptions about these economic conditions raise important questions about the ability to make moral and ethical decisions. As Howells' friend Justice Oliver

---

At first, Isabel articulates two simple conditions: that the apartment must have "a light kitchen and a bright and sunny bedroom for Margaret" (34). The "sunny" lighting seems of paramount importance because Isabel demands that "the rooms must all have outside light" (39). These seemingly insignificant aesthetic criteria reveal Isabel's ignorance of the New York rental market because the cityscape, dominated by skyscrapers and tenements, reveals that finding an apartment with a window in every room is unlikely. March later realizes that the cityscape itself is controlled by the market when he sees "spaces" of undeveloped land "probably held by the owners for that rise in value which the industry of others providentially gives to the land of the wise and good" (264). However, both Basil and Isabel lack this understanding when they first arrive in New York. Their ineptness becomes more apparent when compared with Miss Woodburn, a Southerner who moves to New York with her father, discusses a boarding arrangement with the Leightons. Unlike the Marches, Miss Woodburn "seemed not ashamed to ask if Mrs. Leighton's price was inflexible" until her father "refused to have any bargaining" (100). Miss Woodburn understands that any exchange is subject to negotiation. For instance, when she learns that Wetmore gives art lessons, she wonders if she might bargain with him "to get the lessons for nothing" (101).

Wendell Holmes, Jr., suggests, "nowhere is the confusion between legal and moral ideas more manifest than in the law of contract" (174). The Marches directly confront their inability to make decisions outside the structure of contractual obligations during a chance encounter with a French beggar. In a novel in which contracts often provide a form to structure reality, the French beggar remains outside this structure because the language barrier inhibits his ability to understand and to enter contracts. Because March does not have a contractual relationship with the beggar, March seems not to know how to act in this situation because his very identity is constructed through contractual duties as husband to Isabel or as an employee of Reciprocity Life or *Every Other Week.* Howells discusses a similar dilemma in an essay entitled "Tribulations of a Cheerful Giver" that explores the extent of individual responsibility for social conditions. As Howells states,

> Charity is a very simple thing when you look at it from the standpoint of the good Christian, but it is very complex when you look at it from the standpoint of the good citizen; and there seems to be an instinctive effort on our part to reconcile two duties by a certain proportion which we observe in giving. (156)

For March, these duties are generally contractually determined, and in the absence of a contract, March cannot decide if his decision to give the beggar a coin was the correct one.[23]

Immediately after this encounter, Isabel decides to return to Boston and orders March to honor the conditions she originally articulated, even though none of the apartments they previously visited fulfilled her criteria. Also, she forbids his return to Mrs. Grosvenor Green's flat: "she subjected him, therefore, to an iron code, but after proclaiming it she was apt to abandon him to the native lawlessness of his temperament" (68). Isabel's language evokes law as an "iron code" of inflexible standards while

Once settled in New York, the Marches become part of a new community defined by the contractual relationships that structure *Every Other Week*; indeed, most personal relationships evolve from or are described as contractual ones. *Every Other Week* brings most of the characters together through different kinds of employment contracts; in addition to the more traditional employment contracts like that of March, the magazine also offers economic benefits to new artists like Alma Leighton through discrete contracts that promise a portion of the magazine's future earnings in exchange for an illustration or story. The structure of the magazine also suggests the increasingly speculative nature of the economy. The owner and financial "angel" of the magazine, Jacob Dryfoos, is a man who "got his money together out of every gambler's chance in speculation and all a schemer's thrift from the error and need of others" (168). Dryfoos employs Fulkerson as advertiser, March as literary editor, Beaton as art editor, and his son, Conrad Dryfoos, as manager. March and Beaton then contract with artists and writers like Alma Leighton and Colonel Woodburn and translators like Lindau for their work in exchange for a small payment and a chance at future profits. The community created by the magazine thus ties people together through contractual agreements rather than the common bonds of a traditional community. However, these contractual ties are tested when they must provide connections in social situations.

---

acknowledging the apparently natural "lawlessness" of March's personality that will compel him to break the code. According to March's paradoxical logic, such "freedom brings responsibility" so that he has "no choice" (65). March creates his own code that effectively eliminates his recognition of the extent of his autonomy. March's original characterization as an insurance man becomes relevant once again as he contemplates, against Isabel's express prohibition, Mrs. Green's flat because "he felt that he could take it with less risk" (68). March's code compels him to eliminate risk whenever possible, even at the expense of his own autonomy.

The *Every Other Week* dinner party attempts to transform contractual relationships into personal relationships, and contractualized connections threaten to break down because they are not predicated on the common values that previously provided the foundation for relationships within a community. Tellingly, the discussion of a strike, an action that threatens to rupture contractual relationships, leads to conflict. Fulkerson and Dryfoos tell an anecdote about Dryfoos's previous experience with labor difficulties. When confronted with the possibility of a strike orchestrated by his foreman, Dryfoos agreed with his workers "to sign a promise to keep that foreman" so that the workers would not strike (297). As the situation escalated, Dryfoos agreed to the workers' demands until he could bring in an outside workforce under armed escort. To further enforce his advantage, Dryfoos used another contract to end the strike when he persuaded the other owners to sign an agreement "not to employ any man who would not swear he was non union" (297). These contracts are the only mention of written, signed contracts in the text, and they suggest the power of written language to create and enforce authority.

The interpretation of language is also important in this scene, particularly when Lindau takes issue with Dryfoos's tactics and switches to German to call Dryfoos an "infamous traitor" who committed "vile treason" (296). Neither March nor Lindau knows that Dryfoos also speaks German. Much later, Dryfoos explains to March that he did not like being called "a traitor and a tyrant" at his "own table" (388). For Dryfoos, Lindau's political position is not the real issue. As Dryfoos explains, "I didn't want to be called hard names, and yet I didn't object to his thinkin' whatever he pleased" (389). Dryfoos, the only character who owns real property in New York, may have felt the insults more

intensely because they occurred on his own property; thus, the relationship between property ownership and control can be extended to the control of individuals.

After the explosive conclusion of the dinner party, Dryfoos confronts March about Lindau's status with the magazine, but March refuses Dryfoos' "demand" for information, ignores the "terms" of this demand, and claims that he will not allow Lindau to be "misunderstood" even though Dryfoos understood Lindau perfectly. March also asserts his original contract: "I don't know you, in such a matter as this. My arrangements as editor of *Every Other Week* were made with Mr. Fulkerson" (301-2). March here equates a contractual relationship with a personal relationship and fails to realize that legally Fulkerson merely acted as Dryfoos' agent in hiring employees and that March works for Dryfoos just as he works for Fulkerson. However, March does not "know" Dryfoos on a personal level at all, a lack of knowledge that proves crucial in the dinner party debacle. March also relies on the contract to shape his response to Dryfoos. Rather than asserting moral or ethical grounds as a justification of his position, March couches his response in the terms of the original employment contract.

However, even as March relies on his employment contract to justify his position, he fails to realize that the self-definition the employment contract promises is tempered by stabilizing forces within its structure. While many critics argue that March makes a moral stand when he refuses to fire Lindau, Amy Kaplan suggests that March's action "keeps him from acknowledging Lindau's claim that March is as powerless as the urban working class" (58). That is, when Fulkerson points out that Dryfoos owns the magazine, March replies, "he doesn't own me" (305). However, March later recognizes that "he was risking the support of his family" and realizes "as every hireling must, no matter how

skillfully or gracefully the tie is contrived for his wearing, that he belongs to another, whose will is his law" (306). As March explains to Isabel, "the case is simply this: he owns the magazine" (309). Fulkerson's gift of what Isabel March terms "a new lease on life" (18) turns out to be quite different from March's original expectations as his new employment eventually causes "a disagreeable feeling of being owned" (185), a feeling that threatens the identity of the insurance man to the core.

The contractual bonds established by *Every Other Week* raise analogous questions to those implied by the shift from owning to leasing displayed in the apartment hunting sequence. As the novel progresses and as the Dryfoos dinner illustrates, possession and ownership extend beyond property to the individual. Thus, contracts not only construct identity; they can also subvert it. In *The Gold Standard and the Logic of Naturalism*, Walter Benn Michaels devotes an entire chapter to "The Ideology of Contract" which he discusses in terms of an implied masochistic contract in Frank Norris's *McTeague.* According to Michaels, "if the masochist's desire to be owned is perverse, it is nevertheless a perversion made possible only by the bourgeois identification of the self as property" (124). While masochism can hardly be related to Howells's work, the notion of the self as property is a key one because, as Michaels puts it, "an increased investment in the values of autonomy will naturally be accompanied by an increased insecurity about the status of that autonomy; a self that can be owned can also be sold or stolen or gambled away" (124). Michaels argues that Howells realized that capitalism "acted more to subvert the ideology of the autonomous self than to enforce it" (51).

This subversion becomes most apparent in the later sections of the novel. In contrast to the opening scene in which Fulkerson appeals to March's authentic identity,

Fulkerson's contract negotiations with Angus Beaton, a character who at times believes himself in "possession" of another self (110), take quite a different tone when Fulkerson explains "I don't want to buy you; I want to borrow you," a borrowing which amounts to the lease of a person (109). Fulkerson values individuals in economic terms; he "esteemed a man who was not going to let himself go cheap" (108). Though Beaton claims an inability to "sell" himself to something in which he does not believe (109), he does agree to work for Fulkerson and by extension Dryfoos. Later, Beaton realizes this arrangement signifies much more: "They have me because they partially own me" (212).

That people can be owned applies equally to Lindau, a character who seems incapable of being bought at any price. Of all the characters except Dryfoos, Lindau enters the most contracts. Both Fulkerson and Alma Leighton mention the advantages of leasing Lindau for various uses. Alma, along with other artists, contracts with Lindau to pay "six or seven dollars for the use of his grand old head" as a model (96). Fulkerson later wants to lease Lindau's knowledge rather than his physical appearance; speaking of Germans in general and Lindau in particular, Fulkerson states that "It's a pity they couldn't do the acquiring, and let out the use of their learning to a few bright Americans" (83).

An individual's value is not limited to basic employment contracts predicated on an exchange of labor or products for economic compensation. The leasing of individuals becomes quite literal in discussions of the Civil War that reveal that money could, in effect, buy a person to go to war in the place of another person. For instance, Dryfoos paid to fill the Moffit Quota (274), and his own "substitute" died in the war (290-91). This self-preservation at the cost of another is not limited to the novel's most capitalistic

character; even though Isabel March is "shocked that a poor man must go to war in his own person, and a rich man might hire someone to go in his," she is still "comforted" because if her son, Tom, were ever drafted, March could "buy him a substitute" (254). Here, ownership, which amounts to legalized indenture or even a kind of slavery, reveals the way individuals who believe that they own themselves can also sell themselves.

In this context, the disagreement between Dryfoos and March seems all the more threatening even after it is finally resolved.[24] When Lindau resigns because of his principles, the relationships appear to return to the status quo. However, the confrontation with Dryfoos nevertheless leaves March with a "feeling of impermanency" which continues to undermine March's sense of autonomy (330). The feeling of "impermanency" becomes concrete when the contractual world created by Howells fractures in the explosive strike scene that represents the first real test of the contractual authority previously established. The carefully ordered relationships, already threatened by the March-Dryfoos conflict, rupture as the strike raises questions of legitimacy and justice that implicate the social contract as a foundation for the authority of all contractual relationships. Margaret Vance's description of society as a "painted savage" calls up images of the settlement of America and, by extension, the basis of a democratic form of

---

[24] Fulkerson, faced with conflict between March, Lindau, and Dryfoos, turns to Colonel Woodburn as arbiter of justice. The language of Woodburn's plan for intervention asserts the language of another type of contract--a duel. Woodburn feels "honored" by Fulkerson's request for assistance, and it "gave him something of the high joy that an affair of honor would have brought him in the days when he arranged for meetings between gentlemen" (322). However, by Woodburn's standards, Dryfoos is not a gentleman as Woodburn himself commented when he received the invitation to the party. The situation illustrates an insult to honor typical of the old Southern aristocracy playing out in a new, market economy. As arbitrator, Woodburn is governed by his own sense of "honor" which will not allow him to act as "an intermediary whose failure would leave things in the status quo," and he forces Fulkerson to reveal which "party" he supports (324). Woodburn agrees to meet Dryfoos alone because he believes that "in these matters a principal cannot appeal without compromising his dignity" (325).

government designed to free the colonists from the oppressive authority of England. Similarly, Fulkerson describes *Every Other Week* as an idea which "amounted to something in literature as radical as the American Revolution in politics; it was the idea of self-government in the arts, and it was this idea that had never yet been fully developed in regard to it" (183). Fulkerson's language makes clear that while the magazine seemingly represents a union of artists predicated on social contract theory, in reality it has been formed through a series of discrete, individual employment contracts.

The tension between the idea of contract as a means through which autonomous subjects define themselves and the idea of contract as a stabilizing force founded on violence culminates in Howells' account of a streetcar strike that paralyzes New York.[25] The social unrest inherent in any strike or protest implicates the social contract because a mechanism for enforcement must complete legal contracts. As Lester Lindley notes, part of the utility of contract is its "three party nature which allows the two parties to private contracts to set their terms, but requires society as a third party to settle disputes" (3). Other critics do not view society, or perhaps more accurately the state, as a neutral arbiter of disputes whose threat of force can be justified. Indeed, in a radical critique of the state's role in enforcing positive law, Jacques Derrida takes issue with Walter Benjamin's distinction between the "founding violence" of law (revolution) and the violence (positive law created after the revolution) that "insures the permanence and enforceability of law" ("Force of Law" 981). For Derrida, a state founded on a violent revolution,

---

[25] Many critics believe that Howells's experiences after the famous Haymarket Riot influenced his portrayal of the strike in Hazard. Crowley and Parrish ("Howells and Haymarket"), among others, document Howells's response to Haymarket and to the subsequent treatment of the alleged instigators.

presumably like the United States' break from Britain, would contain within itself the means to justify its own overthrow; thus, in order to critique violence, "one must first recognize meaning in a violence that is not an accident arriving from outside law. That which threatens law already belongs to it, to the right to law (*droit*), to the origin of law *(droit)*" ("Force of Law" 989). According to Derrida, a strike is a perfect example of this problem.

Howells introduces the strike subtly in a way that suggests the role of police power in arbitrating disputes through the threat of force. Beaton, waiting for his train, sees a policeman "lazily swinging his club" and asks the policeman why the trains are late (352). After Beaton and the policeman discuss the strike, Beaton then notices "a policeman at every corner" (354). Newspaper coverage also highlights police power in "editorial comments. . .which praised the firm attitude of both parties and the admirable measures taken by the police to preserve order" (354). The continual references to the police suggest the need for order, perhaps violence, to maintain the delicate balance of a civil society based on social contract theory.

While the workers assert their interests by striking, this assertion affects other individuals who are not so directly involved in the labor dispute. The State Board of Arbitration eventually intervenes, but the "roads" merely "asserted" their right to manage the situation "in their own way" (355). March becomes frustrated and claims "the roads have rights and the strikers have rights, but the public has no rights at all" (356). March, his identity as an employee already fragmented, faces new issues when the strike calls into question his identity as a citizen. According to Fulkerson, "if the men behaved themselves and respected the rights of property, they would have public sympathy with

them every time" (355). However, Fulkerson's statement and March's concerns suggest one of the fundamental contradictions in social contract theory. In *The Second Treatise on Government,* John Locke asserts that individuals "own" their labor: "every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his" (15). If Locke's assumptions are correct, then a strike predicated on a labor dispute would assert the vested interest of the laborer in the property of this labor as against the vested interest of the employer. Mrs. March also indirectly articulates this dichotomy when, fearing Lindau's influence over her children, she considers her children reasonably safe from indoctrination because Bella and Tom had been "nurtured in the faith of Bunker Hill and Appomattox as the beginning and the end of all possible progress in human rights" (253). The reference to Bunker Hill and the American Revolution implies the foundation of human rights is a democracy based on self-government while the reference to Appomattox and the Civil War suggest that human rights could progress no further once slaves became free and consequently owned the right to their own labor.

Just as a discussion of a strike leads to the conflict between Dryfoos and Lindau, a discussion of the streetcar strike provokes the argument between Dryfoos and Conrad, a confrontation that denotes obligations on a different level. Throughout the novel, almost all relationships can be, in one way or another, characterized as contractual agreements. On one level, parent-child relationships seem the only connections outside the legal sphere. However, even parent-child relationships are characterized by exchanges that seem more typical of business relationships than family relationships. Indeed, parent-child relationships represent a different kind of bond, a kind of biological contract that

can even become a legal one because if a parent dies intestate, property can pass by statute to any surviving children. And yet, this bond seems weak, especially in the Marches' relationship with their children. When the Marches travel to New York, they wonder briefly about Bella and Tom, and then realize that the children "who possessed them so intensely when present" seem "almost nonexistent" through the "fantastic operation of absence" (35). The bond is even more complicated in the Dryfoos family because Dryfoos wants to change his son, Conrad, into "a regular New York businessman" (188) and demands that Conrad, who wants to be a minister and "give" himself to others, instead "give himself. . .to his old father and mother" (200).

Dryfoos' expectation that Conrad make a gift of himself raises questions about the relationship between gift and exchange. In personal relationships, "exchanges" are often characterized as unconditional, unilateral gifts rather than conditional, bilateral exchanges like those accomplished through contract. However, gifts, as Margaret's statement originally implied, really are not gifts at all because gifts between parent and child often suggest that the "gift" is really a form of payment in exchange for expected behavior by the child.[26]

Dyfoos clearly expects Conrad to behave in a specific way, and he explains the terms of their exchange: "As long as you eat my bread you've got to do what I say" (364)

---

[26] The economy of gift giving is reflected in Christine's intaglio ring that connects several disparate elements of the novel. The ring, originally purchased by Dryfoos from Fulkerson, represents the conflation of purchasing and giving. Fulkerson originally offered the ring to Dryfoos as a gift, but Dryfoos refused to accept; instead, he insisted on purchasing the ring in a clearly defined contractual exchange. In this logic, Dryfoos pays for the ring so he will not owe Fulkerson anything further in return. Dryfoos then gives the ring to his daughter, Christine, who wears the ring to a party where Beaton moves the ring to her other finger. Later, when Dryfoos and Christine argue about Beaton, Christine returns all the "presents," including the ring that Dryfoos has given her (361). Clearly, Christine interprets the "presents" as payments that purchase behavior.

In response, Conrad only looks at his father in an effort to convey what cannot be verbalized. Despite Conrad's "beseeching looks," Dryfoos continues to press Conrad to state opinions that are bound to anger Dryfoos. The confrontation escalates into a climatic moment when Dryfoos strikes Conrad, and the intaglio ring, representing the conflation of purchase and of gift, slices Conrad's cheek and draws blood. The exchange haunts Dryfoos, who later sees only blood and Conrad's "mild grieving eyes" (365). It is Conrad's look that comes to haunt Dryfoos after Conrad's sudden death during the streetcar strike.

Similarly, a look haunts March in the concluding scene. Indeed, by the end of the novel, March's confidence is shaken, particularly after the accidental death of Lindau and Conrad during a violent moment of the streetcar strike. Though March and Fulkerson acquire joint ownership of the magazine when Dryfoos decides to sell, their venture may not provide the security March desires. Despite the opportunity to own the magazine, March can no longer maintain a consistent sense of self-representation based on the autonomous sense of agency posited by classical contract theory. However, once all relationships become exchanges, a completely intersubjective version of identity and agency also seems problematic. As the Dryfoos dinner party illustrates, a community created through discrete contracts is dysfunctional and provides only limited opportunities to develop an identity defined through its relationships with others. Similarly, parent/child relationships reflect the same kinds of limitations. For instance, Dryfoos restricts Conrad's ability to define himself through relationships with others outside the family and argues instead that family ties trump all other ties. The Marches seem to lack even Dryfoos' misguided concern for his children; indeed, parent/child

relationships in the March family are characterized by absence. Faced with no space outside exchanges from which to define himself, March instead turns to the norms that can be generated within these exchanges. He concludes, "We develop. There's the making of several characters in each of us; we are each several characters, and sometimes this character has the lead in us, and sometimes that" (422). Thus, the only conception of identity available within the text is one that can negotiate various subject positions. However, Howells seems reluctant to leave the reader with such an indeterminate conception of identity.[27]

Indeed, though the conclusion of the novel explores the ability to negotiate various positions, Howells ultimately reinscribes the promise of a transcendental guarantee to secure a consistent sense of self-representation. In the last scene, Howells uses the narrative structure to subvert the temporal equilibrium necessary for a unified sense of self, and this backward shift displaces the forward progression of the novel and calls into question the ability of contracts to fix future behavior. Much like the novel's opening offer, which first refers the reader backward in time to the space preceding the opening scene for the content of the offer, the closing line, in which Basil vows to "trust that look of hers [Margaret Vance]," refers the reader forward to a future time for the performance of the implied contract inferred by Basil from Margaret's look (431). Indeed, by this point in the novel, Margaret, inspired by Conrad, has joined a convent, and the

[27] Critics disagree about what version of identity Howells ultimately endorses. For Amy Kaplan, Howells' realism represents not "a seamless package of triumphant bourgeois mythology but an anxious and contradictory mode which both articulates and combats the growing sense of unreality at the heart of middle-class life" (9). Harmon sees many of these contradictions as fundamental to liberalism and the liberal subject. For Harmon, "Howells implies that dramatizing one's self division is a way to achieve provisional self-integration" (186) and that "moments of vertiginous, deconstructive self-doubt are necessary for the routine functioning of the liberal self, not actual challenges to that form of self" (187). In

Marches initially do not "know her in the dress of the sisterhood" (431). Though Margaret does not speak, she smiles, and the Marches feel in her look "that peace that passeth understanding" (431). As a member of the sisterhood, Margaret has entered a covenant with the Church, and it is the promise of that covenant that March seems to rely on when he decides to trust her look. Because the last line projects the reader into the unknown future, Howells breaks an implied contract with the reader to end the novel with one of a number of agreed-upon realist endings. He supplies those endings for other characters who get engaged or get married. However, the Marches' future is not described. Peyser argues that Howells suggests that the continuity of identity depends upon "the temporal connection between thoughts and selves" (24). March's ending, unlike the diachronic endings provided for the other characters, introduces a synchronic element when he relies on Margaret's look as evidence to support the existence of God. Perhaps March himself best accounted for this predicament early in the novel during the train ride to New York. He asks Isabel:

> Do you see how the foreground next [to] the train rushes from us and the background keeps abreast of us, while the middle distance seems stationary? I don't think I ever noticed that effect before. There ought to be something literary in it; retreating past, and advancing future, and deceitfully permanent present--something like that? (35)

---

contrast, Timothy Parrish describes March as a "deconstruction" of "the bland, liberal, white male" ("Howells Untethered" 102).

The present is only "deceitfully permanent," and the insurance man takes out his most uncertain policy when he relies on the promise of a transcendental guarantee to secure self-representation.

As both *A Modern Instance* and *A Hazard of New Fortunes* suggest, Howells' literary investigation of classical contract theory creates a problem for his account of agency because classical contract theory, as well as capitalism, both facilitates and undermines autonomy. Thus, Howells finds himself in a double-bind in that he wants to validate human agency but the validation provided by classical contract theory calls that version of agency into question. For Howells, the only way out of this double-bind seems to be a provisional account of agency sometimes facilitated by an ambiguous promise like the one Basil March reads in Margaret Vance's face.

In contrast to Howells' gesture to an ambiguous promise to support his account of provisional agency, Henry James admits, in the Preface to *The Wings of the Dove,* that he can provide only a "thin guarantee" that may amount to "an abuse of privilege" when he describes the situations of his characters (46). In the next chapter, I will explore the role of legal discourse in several of James' texts. Like Howells, James also briefly studied law, yet most critics overlook that part of his life and its influence on his work. As I will demonstrate, James often utilizes the language of contract to describe relationships among the characters in many of his texts, and, as the example of his "thin guarantee" suggests, James, like Howells, often used legal discourse to illuminate his aesthetic practice. I will argue that James' work underscores the shift from a classical model of contract to other accounts of contractual obligation such as neoclassical contract theory and relational contract theory.

CHAPTER FOUR

The Continual Fulfillment of Contracts: Representations of Social Relations in Selected Works of Henry James

"Almost the whole procedure of human life implies, or rather, is, the continual fulfillment of contracts."

Theophilus Parsons, *Contracts*

In *Notes of a Son and Brother* (1914), Henry James describes moving to Cambridge to enter Harvard Law School in 1862 as "one of the oddest errands" he "could possibly have undertaken" (290), and looking back some fifty years later, James, seemingly reluctant to explain why he decided to enter law school, provides a variety of possible reasons. At first, he attributes the decision to a vague sense of needing something to do: his "pretensions" did not "fit into any scheme of the conventional maximum as compared with those I saw so variously and strongly asserted about me" (290). He also mentions his father and what may have been the elder James' version of reverse psychology; at first, James Sr. seemed indifferent about whether or not his son continued his education, but when James mentioned entering Harvard Law School, the elder James agreed with no discussion whatsoever. Later, "a certain inconsequence" in his father's attitude makes James wonder if the entire affair "might have been. . .a masterstroke of high policy" (293). Indeed, James recalls "that irony of fate under the ugly grin of which I found my father reply in the most offhand and liberal manner to my remark that the step in question—my joining, in a sense, my brother [William James] at Cambridge—wouldn't be wholly impracticable" (293). Here, the issue at hand seems more about James' family obligations than his education.

Against the background of these complex family relations, James provides yet another possible reason for his decision, a reason that connects law school and his literary ambitions. James writes, "I thought of it [law school] under the head of 'life'" (292-93). Above all, he claims, "what I 'wanted to want' to be was, all intimately, just *literary*" (294 emphasis in original). While Harvard itself seemed "most detached" from literary interests (294), James still found some sense of freedom that, in turn, encouraged his literary interests: "I was to 'go' where I like in the Harvard direction and do what I liked in the Harvard relation" (296). Perhaps most importantly, law school provided James with a "cover" for literary ambitions:

> The drop of the Harvard question had of a truth really meant, as I recover it, a renewed consecration of the rites of that chapel where the taper always twinkled—which circumstances I mention as not only qualifying my sense of loss, but as symbolizing, after a queer fashion, the independence, blest vision (to the extent, that is, of its being a closer compact with the imagination), that I should thus both luckily come in for and designingly cultivate: cultivate under the rich cover of obscurity. (295)

James, then, first consciously cultivates his aesthetic vision, and, by extension, his own "compact with the imagination," alongside his short-lived foray into the law.

Given the wide range of critical approaches to James' works, it is surprising that literary critics began only recently to explore the ways in which an understanding of law and legal issues can lead to fresh insights about his work, particularly his aesthetic theories and his representations of subjectivity and personal relationships more

generally.[1] Indeed, current scholarship on James and the law certainly yields new directions for future inquiry.[2] For instance, Anat Pick focuses on justice as an ethical, rather than strictly legal, issue. In "Miracles of Arrangement: Structures of Multiplicity and the Birth of Justice in Henry James' *The Golden Bowl,*" he explores James' depiction of personal relations as "fundamentally polygamous" (116). That is, personal relations are characterized by a "multiplicity" (117) that Pick links to Levinas' conception of ethics as openness to the other in order to argue that, in Book One in particular, "characters remain wholly and intimately open to one another, regardless of their official engagements" (118). Book Two, in which the main characters pair off in couples, then, "illustrates the birth of social order, . . .the birth of justice" (118). However, Pick suggests a conditional relationship between the two books because the monogamous order of justice in Book Two "appears at last as the product of a chaotic multiplicity of relations" (128).

Other critics comment on James' use of the language of property law to describe his aesthetic practice. While Brook Thomas suggests that James "adopts the language of property relations to describe aesthetic relations" in order to illustrate "the difference between possessing a work of art as a piece of property and possessing it through an

---

[1] James' brief time as a law student may have been overlooked, at least by earlier critics, because James begins his account of Harvard in the same chapter in which he also mentions his by now infamous "obscure hurt" (*Notes of a Son and Brother* 298). Most critics focus on the "obscure hurt" at the expense of other events that occurred around the same time. For an account of the "obscure hurt," see Edel's *Henry James: A Life*, pages 56-61.

[2] Like Alcott and Howells, James was also involved in contractual negotiations with his publishers and generally took an active role in his business affairs. In *Henry James and the Problem of Audience*, Anne T. Margolis explores the relationship between the commercial marketplace and James' work. Similarly, in *'Friction with the Market': Henry James and the Profession of Authorship,* Michael Anesko draws from publishing records and James' letters to his editors to trace James' "relation to the marketplace" and "its

imaginative act of appropriation" (86), Richard Adams' "Heir of Propriety: Inheritance, 'The Impressions of a Cousin,' and the Proprietary Vision of Henry James" points to a different connection between the language of property relations and aesthetics. Unlike Thomas, Adams turns to James' personal experiences with law and legal issues, particularly James' role as the executor of his father's estate. Indeed, the complex family dynamic I mentioned before played out quite dramatically when the elder James died and left Henry rather than the elder William in charge of administrating the estate. Adams draws on a series of letters in which James and his brother William argue about how to interpret their father's will, particularly a clause which disinherits their younger brother Wilkey. James favors ignoring the will and distributing the estate equally while William demands that the family follow the letter of the law as their father laid it down in the will. With James' experience as executor in mind, Adams argues that James develops a "proprietary artistic vision" in which "his aesthetic vision arrogated to itself control over the property and lives of others" (465). This aesthetic vision plays out in James' novella "The Impressions of Cousin," written shortly after he served as executor of his father's estate, in which James describes a "self founded on the dual supports of ownership and aesthetics, rather than upon the urge to acquire" (468).

Inquiries into James' version of the "self" lead Brook Thomas and Irene Tucker to turn to contract law and contract theory more generally as possible sources for fresh insights into relations between people as well as an already much discussed area of inquiry—the representation of subjectivity in James' works. Though Thomas argues that

---

impact on his imagination" (ix). Since Margolis and Anesko provide a detailed account of James' business relationships, I decided not to provide a brief review of his business correspondence.

James "does not offer a critique of contract" (88) either in *The Bostonians* or "The Aspern Papers" (the two works Thomas discusses), Irene Tucker does find such a critique in *What Maisie Knew.* In "What Maisie Promised: Realism, Liberalism, and the Ends of Contract," Tucker argues that by "imposing" the model of the liberal subject on "a child who cannot fulfill or embody it," the novel "can be seen to represent the patent falsity of the promissory contract's presumptions" (340). Indeed, Tucker situates the novel alongside an historical moment of transition from a promise-based view of contract (classical contract theory) to a reliance/benefit-based view of contract (neoclassical contract theory) and argues that James' novel reveals that contract works as a "narrative form, an instrument that constructs a concept of an individual subject's agency and knowledge as probable rather than ideal and certain" (341). This "probabilism," in turn, recognizes "the limitations placed upon the idea of an autonomous liberal subject by the vagaries of history" (341).[3] In contrast to Tucker's account, Thomas focuses on the promise of contract reflected in James' works and believes that "James, intrigued by the promise of contract, presents an immanent exploration of social relations that stretches contractual thinking to its limits" (89). For Thomas, James' work reveals that "because no essential self exists outside of exchanges, all exchanges are interpersonal and affect the very nature of the self" (70). The Jamesian self, then, "cannot achieve definition without a 'space between' that only interpersonal relations can provide; at the same time, interpersonal relations are impossible without an emptiness within the self, an emptiness making one vulnerable to penetrations—and dominations—by another" (70).

---

[3] Tucker builds on this claim in her book *A Probable State: The Novel, the Contract, and the Jews.*

Of the critics who discuss James' interest in contract law, no one, to my knowledge, has addressed contract law or contract theory in *The Portrait of a Lady* and *The Wings of the Dove*. The different approaches of Thomas and Tucker reflect a division in legal scholarship about the function of contract law. To some extent, Thomas' work, with its attention to promising and despite his attempts to separate contract from a transcendental version of promising, shares some similarities with classical contract theory and more recent scholarship, such as that of Charles Fried, who focuses on the moral authority of the promise as the foundation of a contract; like Fried, Thomas wants to preserve the moral authority of promise, but he does not want to invoke an a priori version of the person as prior to his or her ends as Fried does. In contrast, Tucker's approach generally follows the trajectory indicated by legal scholars such as Grant Gilmore and P. S. Atiyah, who point to a shift during which classical contract law evolved from an approach that emphasizes the promise to a neoclassical approach that emphasizes the conditions created by the contract. Thus, this second approach to contract asks questions about who benefits from a particular arrangement or who relies on a particular arrangement. Relational contract provides another model through which we can think about James' representation of contracts. Relational contracts emphasize long term relationships that cannot be accounted for by the discrete exchanges posited by classical contract theory; similarly, the relational model attends to maintaining the relationship itself rather than valuing a particular exchange. In the discussion that follows, I hope to contribute to both Thomas' and Tucker's insights by attending to the ways in which different accounts of contract produce different accounts of justice that, in turn, can shape available self-representations.

Because assumptions about justice and interpretation are perhaps most prevalent in the law itself, in order to understand the contractual logic at work in both texts, it is important to consider James' own experiences with the law and legal thinkers as well as the general understanding of contract during the late nineteenth and early twentieth centuries. In an effort to shed new light on this area of inquiry, I will turn to James' brief experience as a student at Harvard Law School during 1862. During this time, he took courses with Dr. Theophilus Parsons, Emory Washburn, and Judge Joel Parker (Edel *The Middle Years*, 197).[4] Of particular interest here is Parsons, who wrote a treatise on contract law. James describes Parsons fondly, as one whose "rich, if slightly quavering, old accents were the first to fall upon my ear from beneath a huge hot portrait of Daniel Webster" (347). More specifically, Parsons possessed "all the marks one might have wished him, marks of a social order, a general air, a whole history of things, or in other words, of people" (347). The "marks" James notes, particularly those that suggest Parsons' attention to history and to people, are apparent in Parsons' ideas about the function of contract law. Parsons opens his two-volume work with an all-encompassing view of contract:

> The law of contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grows all rights, all duties, all obligations, and all

[4] Edel briefly treats James' experiences at Harvard. Novick's biography goes further and asserts, though tenuously, that Oliver Wendell Holmes Jr. may have been James' first lover (109-10).

> law. Almost the whole procedure of human life implies, or rather, is, the continual fulfillment of contracts. (3)

For Parsons, all rights and duties are somehow contractual, and the bulk of human activity depends on contractual logic as an organizing principle: "contracts bind all to all" (4). In support of his claim, Parsons provides a compelling example—parent and child relationships: "the parental love which provides for the infant when, in the beginning of its life, it can do nothing for itself, nor care for itself, would seem to be so pure an offering of affection, that the idea of a contract could in no way belong to it" (3). However, as Parsons goes on to explain, "even here, although these duties are generally discharged from a feeling which borrows no strength from a sense of an obligation, there is still such an obligation" (3). Parental obligation "is implied by the cares of the past, which have perpetuated society from generation to generation; by that absolute necessity which makes the performance of these duties the condition of the preservation of human life" (4). In turn, the children's "implied obligation" provides that when they "have grown into strength, and age has brought weakness upon those to whom they are thus indebted, they will acknowledge and repay the debt" (4).

As the parent-child example suggests, Parsons views contracts as much more than a tool for negotiating and structuring market-oriented, business arrangements. Indeed, he recognizes that while some contracts "are deliberately expressed with all the precision of law, and are armed with all its sanctions," many other contracts "are, though still expressed, simpler in form and more general in language, and leave more to the intelligence, the justice, and honesty of the parties" (4). Parsons even goes so far as to

suggest that some contracts are not "expressed" at all, and to interpret these "implied" contracts, we must "look to common principles which all are supposed to understand and acknowledge" (4). Here, "contract is coordinate and commensurate with *duty*" (4, emphasis in original), and, as a result, one "principle of law" proposes "that whatsoever a man ought to do, . . .the law supposes him to have promised to do" (4). These implied contracts form the "web and woof of actual life" (4).

Parsons is an interesting figure to situate within typical accounts of the history of contract law and contract theory in nineteenth-century America. Parsons writes well before both the ascendancy of freedom of contract associated with classical contract theory and Christopher Langdell's famous "formalization" of contract law at Harvard Law School. Also of historical importance is Parsons' definition of a legally enforceable contract as "an agreement between two or more parties, for the doing or not doing of some specified thing" (6). However, though his definition emphasizes the fact that the parties have agreed to do something rather than the nature or justice of the thing to be done, the definition does not call attention to an exchange of promises in the way that classical contract theorists writing later in the century often did. Similarly, and perhaps not surprisingly, since Parsons does not emphasize promising to the extent that classical contract does, he does not view justice as neutral. When parties end up in court, the "law exercises a compulsory power" necessary to "the well-being of society" (4). For Parsons, "the well-being of society depends upon, and may be measured by, the degree in which the law construes and interprets all contracts wisely; eliminates from them whatever is of fraud, or error, or otherwise wrongful; and carries them out into their full and proper effect and execution" (5). Parsons suggests, counter to the logic of most classical

contract theorists, that the court can and should play an active role in resolving contractual disputes.

With Parsons' work in mind, then, I will look at the representation of contracts and contractual disputes as well as legal discourse more generally in James' work. Legal discourse plays an important role both in James' fiction and in his aesthetic theories. In *The Portrait of a Lady* and *The Wings of the Dove,* legal discourse marks the intersection of market-oriented and ethical claims.

First, James often uses legal discourse to describe his aesthetic theory and to define the relationship between writer and reader. For instance, in the Preface to *The Portrait of a Lady,* James characterizes his ensemble cast—all of the characters except Isabel Archer—as "a group of entertainers who come down by train when people in the country give a party; they represented the contract for carrying the party on" (12). Here, James' characters sound much like employees hired to fulfill a specific, discrete contractual obligation. However, James bitterly notes that he cannot create a similarly stable "relation with the reader" (13). He uses the metaphor of an entitlement to argue that the author "is entitled to nothing, he is bound to admit, that can come to him from the reader, as a result of the latter's part of any act of reflection or discrimination" (12). Indeed, the author's only entitlement is a vague "benefit," "the benefit in his having cast a spell upon the simpler, the very simplest forms of attention" (12). James further delineates the nature of this entitlement by invoking the economic language of the market to measure the exchange between reader and writer; the writer, perhaps like James' own ensemble of characters, must work for a "living wage," which "is the reader's grant of the least possible quantity of attention required. . . ." (13). James' use of grants and

entitlements to describe the relationship between reader and writer seems quite striking, especially given his own legal background and his desire to formalize his relationship with his audience. He writes, "the artist may of course, in wanton mood, dream of some Paradise (for art) where the direct appeal to the intelligence might be legalized" (13). James' dream depends upon the legalization of the relationship between writer and reader, and his aesthetic theory and practice suggest that such legalization can occur through creating a contract to formalize that relation by making such appeals to his readers' intelligence both permissible and within the realm of expectation for both parties. James explores the terms of such a contract in *The Portrait of a Lady* itself by opposing "the reader's right to a nearer and clearer view" to the aesthetic "privilege of point of view." Throughout the novel, James constructs privacy so as to reconstitute the reader's right as a privilege that one must choose to exercise even as he constrains that ability to choose by keeping the terms of several textual contracts (i.e., Isabel's mysterious tie to Caspar Goodwood, Isabel's marriage to Gilbert Osmond) obscured. Similarly, this construction of privacy depends on an abstract version of contract as an ahistorical agreement that offers the possibility to restructure social relationships with an eye to the future, yet without reference to the past. From a private space, Isabel Archer can begin anew again and again to define herself through only the relationships in which she chooses to participate. However, through this very construction of privacy, the active agency implied by choice becomes a passive, and more ambiguous, account of agency as consent in that the power to agree to the terms of a contract does not necessarily coincide with the power to write or rewrite those terms.

James reevaluates the legalization, and thus formalization, of the relationship between reader and writer in the Preface to *The Wings of the Dove* where he offers only a "thin guarantee" that can seem, at best, "an abuse of privilege" (46). In contrast to the specific allocation of rights and privileges in his discussion of *The Portrait of a Lady*, James here depicts a more fluid conception of his relationship with his audience. In *The Wings of the Dove*, he explores the tension between the classical model of contract as a discrete exchange in which autonomous parties promise to fulfill certain specific obligations and a relational model of contract that instead emphasizes the continual modification and adaptation of rights and obligations of the parties in response to changing circumstances. According to Ian MacNeil, "the ultimate goal of the parties to a discrete exchange is to bring all the future relating to it into the present or, to use a rare word, to presentiate" (*The New Social Contract* 19). As Jay Feinman explains it, relational contract's major contribution to contract law and contract theory is the observation that "the values of 'discreteness' and 'presentiation' are not synonymous with all contracts, but comprise one pole of a continuum that ranges from highly discrete relations to those that are highly intertwined" (1302). Feinman also points out that, according to the relational model, "even highly discrete contracts are embedded in a complex fabric of relations" (1302). It is this "fabric of relations" that Parsons' work and James' *Wings of the Dove* aptly reveal over one hundred years before legal scholars really began to recognize this aspect of contractual relations. Thus, unlike *The Portrait of a Lady, The Wings of the Dove* suggests that contractual relationships are always already situated within a matrix of social relationships. Before turning to my discussion of *The*

Wings of the Dove, I will begin my investigation into the role of contract in James' work with a detailed reading of *The Portrait of a Lady.*

The Reader's Right and the Privilege of Point of View in Henry James' *The Portrait of a Lady*

"It was the tragic part of happiness: one's right was always made at the wrong of some one else."

Isabel Archer in James' *The Portrait of a Lady*

In *The Portrait of a Lady*, Isabel Archer realizes that "to prefer" Gilbert Osmond "was. . .to break all other ties;" for Isabel, "it was the tragic part of happiness; one's right was always made at the wrong of some one else" (295). These statements suggest that Isabel believes that to choose to marry Osmond (to her the right decision at that moment) means that she must "break" her "ties," presumably with her other suitors, and thus "wrong" them in some way. The same sort of logic seems to apply to her final decision to return, we assume, to Osmond in Italy and, in the process, to wrong Caspar Goodwood by refusing to stay with him. This decision to return to Osmond has been the subject of numerous critical essays in which critics judge Isabel Archer's actions and offer a variety of motives for those actions.[5] This process of judgment is enacted in the novel itself; as the quotation above suggests, Isabel's concern about wronging others reflects her preoccupation with acting in a just manner, and many of the other characters seem to

---

[5] The possibilities are endless. Niemtozow characterizes the choice as one between divorce and duty (382). Mc Master suggests that the choice really is not a choice at all since Isabel's "choices have all along been determined" (57). Edel also suggests that Isabel, in the famous Chapter 42, "recognizes that the choice of her fate has not been altogether hers" (17). In contrast, Rodenbeck reads this decision as a choice for freedom, and Isabel returns, at least partially, to extend this freedom to Pansy (339). MacComb argues that Isabel resists the "radical break" (129) offered by divorce because she realizes that "personal liberty cannot

share her concerns about justice. As Adam Parkes points out, "James' characters frequently ask each other for justice" (611), and this novel raises important questions about the nature of justice and what it means to "do justice."[6]

James suggests that the reader also participates in the process of judgment because the narrator acknowledges that readers have specific rights; in this case, "the reader has a right to a nearer and clearer view" (105). That readers have rights suggests an aesthetic contract that formalizes the expectations readers bring to the text based on what the writer promises to perform. However, the text undercuts this premise by keeping the terms of several agreements private—including Isabel's mysterious tie to Caspar Goodwood and her engagement and marriage to Gilbert Osmond—even from the reader. Similarly, the terms of other agreements, such as the one involving Osmond and Madame Merle, are withheld throughout most of the text. Indeed, at one point in the novel, when Isabel is writing a note to a friend, the narrator tells us that it is "our privilege to look over her shoulder, and if we exercise it we may read the brief query" (381). This privilege suggests Isabel's assertion of her own "point of view" as a standard of justice during a discussion with one of her suitors (107). As Isabel puts it, "we see our lives

---

be gained by disengagement from struggle" (130). For Veeder, Isabel's freedom lies in "isolation" rather than in "relationships" (746).

[6] In "A Sense of Justice: Whistler, Ruskin, James, Impressionism," Parkes frames James' account of justice in *Portrait of a Lady* through a reading of James' response to the Whistler-Ruskin trial. Parkes argues that the novel "restages some of the crucial issues raised by the Whistler-Ruskin controversy[,]. . .particularly the conflict between subjective perception and collective judgment" (610). For Parkes, this novel asks us "to weigh the relative claims of individual sensory responses, on one hand, and, on the other, social and moral conventions" (622). Because James cannot resolve the Whistler-Ruskin conflict, "his audience must restage his divided response" to the trial as well as his "anxious quest for a sense of justice. . .in its own acts of reading" (623). Like Parkes, I am also interested in the representation of justice in *The Portrait of a Lady*; however, my reading emphasizes the ways in which James employs legal discourse itself to describe the relationships among characters as well as the relationship between reader and writer. Thus, I focus on specific rights, particular the right to privacy and the reader's "right" to "a nearer and clearer view," and the account of justice produced by the construction of privacy in the text.

from our own point of view; that is the privilege of the weakest and humblest of us" (107). Point of view, then, is a privilege that one must choose to exercise, and James often dramatizes this choice as the renunciation rather than the exercise of that privilege. The reader's right, then, becomes contingent upon the privilege of choosing, a privilege often justified through an appeal to a particular construction of privacy. Thus, throughout the novel, James opposes the "privilege" of point of view to the reader's right to a nearer and clearer view, yet, despite the reader's right to this nearer and clearer view, James' aesthetic practice consistently undermines this right. Doing justice, then, to James' text risks reading it wrong, a problem Isabel herself often experiences.

James introduces the risks of wrong reading in the opening pages of the novel when Ralph Touchett, Isabel's cousin, and his father, Isabel's uncle, discuss the ambiguity of Mrs. Touchett's telegram about Isabel. In part, the telegram reads as follows: "Taken sister's girl, died last year, go to Europe, two sisters, quite independent" (24). Ralph wonders

> Who's 'quite independent' and in what sense is the term used?. . .Is it used in the moral or the financial sense? Does it mean they've been left well off, or that they wish to be under no obligations? Or does it simply mean that they're fond of their own way? (24)

The questions Ralph raises here could well be asked about Isabel throughout the novel, and James never provides clear-cut answers as the novel consistently raises questions about Isabel's moral and financial independence as well as her obligations to others. The construction of privacy in the text, then, repudiates the reader's right to "a nearer and

clearer view" because the reader is consistently denied access to the terms of the private agreements that influence Isabel's decisions; because those agreements remain private, readers are unable to judge her actions fairly, and a "right" reading does not readily emerge. The act of reading, and thus both legal and literary interpretation, plays an important role in the process of judgment, and the novel repeatedly links the act of reading and interpreting a text with providing a legal judgment. The text itself is referred to as the "record" (140), and James clearly involves readers in the process of judgment because "we judge" Isabel's actions (220). Yet, just as Isabel once admits that she has not "read" Gilbert Osmond "right," our readings of her are similarly unstable.

Indeed, *The Portrait of a Lady* dramatizes Isabel's sense of justice as, ultimately, a private virtue backed up by private property and indicated by her desire for fidelity to her promises rather than some recognition of their consequences. However, despite her attention to her promises and the duties and rights they create, she also frequently asserts the right to be let alone as a means to secure a space for her identity. Her preoccupation with rights, particularly the notion that others "ought to know when to let one alone" (137), prefigures a famous account of privacy published in 1890 entitled "The Right to Privacy" in which Samuel D. Warren and Louis D. Brandeis argue that the right to life, long protected under the law, "has come to mean the right to enjoy life,--the right to be let alone" (193). In a fascinating discussion of *The Bostonians* and "The Aspern Papers," Brook Thomas draws on Warren and Brandeis' article to argue that, for James, private personality depends on "the creation of a space between, a space that establishes a connection while simultaneously helping to define the parties involved as individuals" (69). As Thomas points out, the right to privacy can be defined in numerous ways,

including Warren and Brandeis' conception of privacy as "the right to be let alone" ("The Right to Privacy"193). Thomas, following Warren and Brandeis, tends to characterize this right as a right to a private personality that should not depend upon traditional conceptions of property rights for its recognition.[7] Thomas draws on this conception of an "inviolate personality" to argue that James, like Warren and Brandeis, links artistic production and privacy. However, James then "complicates that linkage by reminding us that an innermost self is itself the product of relations with others" (78), rather than, as Warren and Brandeis would have it, an inviolate personality that exists prior to its relations with others.

In contrast to Thomas' account of privacy in *The Bostonians*, *The Portrait of a Lady* (published in 1880, about ten years before "The Right of Privacy" came out in the *Harvard Law Review*) reveals the relationship between privacy and property, a relationship that Warren and Brandeis themselves allude to in the concluding lines of their essay. Here, they reinscribe the relationship between property rights and privacy rights: "The common law," they write, "has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands" (220). They conclude the essay with a question for their audience: "Shall the courts thus close the front entrance to constituted authority, and open wide the back door

---

[7]In "The Right to Privacy," Warren and Brandeis turn to the protection of artistic productions as an example "of the more general right to be left alone" (205). The right to be left alone is, with its "quality of being owned or possessed" (205), like other rights that protect against assault, defamation, false imprisonment, and malicious prosecution and can be considered a "property" right (205). However, the rights listed above, as well as the right to privacy, depend on something other than property rights: "the principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality" (205).

to idle or prurient curiosity?" (220). Here, privacy depends on closing both doors, a logic Isabel Archer follows to the letter.

Isabel's private, childhood sanctuary is the site of one of the most important moments in the novel: Mrs. Touchett's offer to take Isabel to Europe. Isabel meets Mrs. Touchett for the first time in the office, a room connected to the library in Isabel's Albany home. As the site of her agreement with Mrs. Touchett, this space seems particularly significant; in the most literal sense, Isabel leaves the office to go with Mrs. Touchett to Florence. In this room, Isabel forms a childish relationship with furniture that has been discarded, and here also we see her earliest conception of justice. She focuses on the surface of "old pieces of furniture" whose "infirmities were not always apparent (so that the disgrace seemed unmerited and rendered them victims of injustice)" (33). As many critics point out, this space represents a private sanctuary for the young Isabel, a sanctuary with an unused door "secured by bolts which a particularly slender little girl found it impossible to slide" (33). However, the adult Isabel, presumably physically capable of sliding the bolts, instead does not; "she had never opened the bolted door nor removed the green paper (renewed by other hands) from its side-lights; she had never assured herself that the vulgar street lay beyond" (33). Isabel leaves the door bolted and the paper intact in an effort to secure her privacy, yet from this private realm, Isabel cannot form ties with others.

Indeed, the first tie Isabel forges requires her to leave the privacy of her childhood sanctuary to enter a quasi parent-child contract. As an orphan, Isabel seems to be on her own and free to choose her destiny, and James describes her situation with contractual language that invokes this very sense of free choice and suggests the corresponding view

of contract as an ahistorical, abstract agreement. Mrs. Touchett explains the terms of the agreement to Isabel: "If you'll be very good, and do everything I tell you I'll take you there" (36). Here, Isabel must choose to play the child's role, and though Isabel initially believes that she cannot "promise that," she almost immediately changes her mind and claims that "to go to Florence," she would "promise almost anything" (36). Similarly, much like the positive view of contract theory as hypothetical freedom, Mrs. Touchett's offer provides Isabel the opportunity "to leave the past behind her. . .and to begin afresh" (39), and as Isabel later tells Ralph, she came to Europe "to be as happy as possible" (52). Isabel's motives suggest a view of contract as a tool through which autonomy can be achieved. Indeed, she believes that her promise reflects the possibility to pursue her own ends; for Isabel, this agreement offers the opportunity to choose to be happy even at the same time that she binds herself to someone else's terms in a way that may potentially frustrate the very self-realization she seeks.

Contractual logic, then, leads Isabel to emphasize her freedom to choose; however, at the same time, the agreement she enters with Mrs. Touchett highlights one of the ways in which contracts can also undermine the hypothetical freedom they promise. One of the conditions of this agreement is that Isabel will do everything Mrs. Touchett tells her, and Mrs. Touchett reminds Isabel of the terms of their agreement when she tells Isabel not to entertain Lord Warburton with only her cousin Ralph for a chaperone. Isabel acknowledges that Mrs. Touchett is "quite right" to tell her, and Mrs. Touchett replies, "I shall always tell you. . .whenever I see you taking what seems to me too much liberty" (67). Isabel explains that, even though she may not think that her aunt is "just," she "always want[s] to know the things one shouldn't do. . .so as to choose" (67). By

emphasizing her ability to choose, Isabel seems to assert her freedom to choose at the expense of her obligation to Mrs. Touchett; however, Isabel herself later refuses an invitation for an extended visit to Lord Warburton's home because she is in her "aunt's hands" and therefore unable to "make engagements" on her own (76). Thus, Isabel does come to realize the constraints to which she also agreed. Isabel's sense of what is "just" is also quite complicated; she does not believe that her aunt is "just," even though Mrs. Touchett, by reminding her of the terms of their initial agreement, implies that the promise itself justifies the contract despite the fact that Isabel did not negotiate its terms. Indeed, despite the attention to Isabel's choices, Isabel really consents to a set of terms she did not write.

Isabel's sense of justice also becomes an issue in her interactions with her suitors, Caspar Goodwood and Lord Warburton. These scenes invoke justice as a process by using the language of the court to highlight connections between justice and judgment. Goodwood and Warburton are described as "passionate pleaders" competing for the right to marry Isabel, who is figured, in turn, as the judge making the final decisions on their cases (107). When Warburton proposes, Isabel can only "promise. . .to do it [the offer] justice" (100). After Warburton leaves, Isabel concludes that "what she felt was not a great responsibility, a difficulty of choice; it appeared to her there had been no choice in the question. She couldn't marry Lord Warburton" (101).

The justice Isabel eventually does Warburton dramatizes the conflict between the reader's "right to a nearer and clearer view" and the "privilege" of "point of view." Isabel finally answers Warburton in a brief letter justifying her decision; she argues that "these things cannot be reasoned about[;]. . .we see our lives from our own point of view; that is

the privilege of the weakest and humblest of us" (107). Here, she justifies herself based on the most private of standards—the "privilege" of her own "point of view." She then asks him for justice: "do me the justice to believe that I have given your proposal the deeply respectful consideration it deserves" (107). However, Warburton requests specific reasons to justify her decision when he explains his position: "You don't seem to have any reason, and that gives me a sense of injustice" (117). Here, Warburton is unwilling to accept Isabel's justification and thus denies her the "privilege" of her own "point of view." In an attempt to clarify further, Isabel explains that to marry him would mean "giving up other chances" (118); she can "never be happy," she says, by "separating" herself "from life" (119).[8] Ironically, in order to make this claim, Isabel must rely on the separation from life inherent in any claim for privacy.

As we see in her relationship with Warburton, Isabel cannot assert a private standard of justice, her point of view, and expect that others will read her right and thus recognize her as just. Isabel's relationship with Goodwood takes this a step further, for Goodwood is totally unwilling to recognize Isabel's right to privacy unless she contracts for it. The issue of privacy seems particularly important in Isabel's relationship with Caspar Goodwood because they seem to have a tie in the past to which the reader is never privy. Goodwood's first appearance in the novel is quite mysterious as he visits Isabel shortly after she accepts Mrs. Touchett's offer and may then have proposed, but the reader does not see this visit. Instead of specifics, the reader learns only that "he was supposed by the world in general to wish to marry her, but this of course was between

[8] Ralph plays a curious role in Isabel's interactions with her suitors. Ralph wants to know why she refused Warburton and asserts his "right" to ask because he has an "interest" in the answer (131).

themselves" (42). Here, the narrative implies a right of privacy that trumps the reader's right to know. Though we do learn that Goodwood left her "with the feeling of a man defeated" (42), the first significant information about their relationship comes later, when Isabel receives his letter, a letter appealing to her sense of justice. Like Warburton, Goodwood also employs the language of the courtroom. Goodwood, a man who "could make people work his will, believe in him, march in him, and justify him" (106), reminds Isabel about their final meeting before she left Albany: "You in fact appeared to accept my protest and to admit that I had the right on my side" (93). He expresses concern that she cannot provide a "reason for the change" other than an admission that she is being "unreasonable" (93). However, Goodwood appeals to her sense of justice when he argues that she is not "arbitrary or capricious," and it is, in Goodwood's view, her sense of justice that leads him to believe that she will agree to see him again.

Isabel, in turn, thinks Goodwood may be "the stubbornest fact" she knows, and she realizes that "she must make terms with him at last—terms which would be certain to be favourable to himself" (105). When she thinks about their meeting in Albany, she recognizes that one reason she accepted her aunt's offer was "to resist such an obligation" by "hav[ing] an answer ready" for Goodwood. Isabel also wonders "whether if her aunt had not come that day in Albany she would have married Caspar Goodwood" (472). According to this logic, Isabel's obligation to her aunt frees her from, or at the very least postpones, her obligation to Goodwood. On one level, Isabel must symbolically reject the private sanctuary of the office in order to preserve her privacy against the threat posed

by her obligation to Goodwood.[9] She must enter the world in order to refuse contact with a part of it.

In contrast to Isabel's view of privacy as an absolute right, her interactions with Goodwood reveal that the security of privacy often depends on its recognition through a contractual agreement. Goodwood, a man with "a strong sense of justice," follows Isabel to Europe to resolve their relationship and asserts his ability "to argue the question of his rights" (136) in the matter of not "losing" her (137). In response, Isabel claims that he has "no right to talk of losing what's not [his]," and points out that he "ought to know when to let one alone" (137). Her suggestion that she wants to be let alone is particularly interesting here as she is, in a sense, invoking her right to privacy.[10] As is the case in her conversations with Warburton, her discussion with Goodwood also emphasizes the privilege of her point of view when she claims "we have each to judge for ourselves" (139). Isabel characterizes Goodwood's assumption that she will marry another man as a "charge" (139), again invoking the language of the courtroom, that represents a "great injustice," and her proof is her refusal to marry Warburton (140). When Goodwood "plead[s] guilty" to being angry with her, Isabel repeats her claim that he does her "very little justice" (141). However, Goodwood also wants her to do him "justice" because he, in a sense, recognized her right to be left alone when he agreed not to accept Ralph's

---

[9] However, it may also seem that Isabel merely exchanges one private space for another as Gardencourt is described as a place where "privacy. . . reigned supreme" (18). For Isabel, Gardencourt "at once revealed a world and gratified a need" (57). Isabel seems drawn to the "sense of well-ordered privacy in the centre of a property" (57).

[10] Her language is consistent with Warren and Brandeis' belief that the "right to enjoy life" is synonymous with the "right to be let alone" (193). Isabel also echoes Warren's and Brandeis' belief that the right to property now includes "the products and processes of the mind" (194) when she claims that she has a "right" to her feelings (139).

invitation for a visit (141). Here, Goodwood contractualizes a right that Isabel views as beyond contract. For Isabel, the right to privacy defines her sense of liberty. She explains her position by emphasizing her "personal independence": "If you were in the same place I should feel you were watching me, and I don't like that—I like my liberty too much" (142). Here, as in the earlier description of her childhood sanctuary, privacy is linked to physical space that secures liberty, a space that Goodwood can invade to watch her. Against Goodwood's contention that marriage to him would make her independent, Isabel argues:

> I try to judge things for myself; to judge wrong, I think, is more honourable than not to judge at all. I don't wish to be a mere sheep in the flock; I wish to choose my fate and know something of human affairs beyond what other people think it compatible with propriety to tell me. (143)

Finally, Goodwood promises to stay away for two years, perhaps agreeing with Isabel's point that he will "lose nothing by being a reasonable man" (144). For Isabel, getting "rid" of Goodwood is "like the payment, for a stamped receipt, of some debt too long on her mind" (144). Here, Isabel again secures her right to privacy through an agreement with Goodwood; however, Isabel apparently does not understand the implications of this agreement. Just as Warburton will not recognize a private standard as an adequate reason for her refusal to marry him, Goodwood is not willing to recognize privacy as a kind of natural right, and thus Isabel must acquire that right through a contract. Since Goodwood does not promise to stay away forever, she is not really rid of him, and the right to

privacy is limited to a specific term. Here, the debt, whatever it may be, is merely deferred rather than paid in full.

Property represents another limitation of the right to privacy because ownership provides the means to secure this right. When Isabel learns that she has inherited half of Mr. Touchett's substantial fortune, Mrs. Touchett explains thus: "Now, of course, you are completely your own mistress and are as free as the bird on the bough. I don't mean you were not so before, but you're at present on a different footing—property erects a kind of barrier" (190).[11] In this sense, property literally secures the freedom to be left alone and suggests that privacy must be paid for. As Mr. Touchett himself once explained to Isabel, "There's room everywhere. . .if you pay for it. . . .Perhaps you might also have to pay too much" (104). I might also point out that Isabel acquires this inheritance only because Ralph, as the Touchetts' only child, contracted away half the fortune his father planned to leave to him alone. Thus, two private arrangements—both, in a sense, parent-child contracts—provide the means through which Isabel can secure her privacy. First, Isabel gives up the privacy of her childhood sanctuary in order to accept Mrs. Touchett's initial offer, an offer that creates a parent-child relationship between them. Second, Ralph gives up part of his inheritance through another parent-child contract to fund Isabel's financial independence.

Ironically, Isabel likely loses at least some of this financial independence through one of the most private ties alluded to in the novel. Isabel's relationship with Osmond is

---

[11] Isabel is, at first, skeptical about her new opportunities; as she explains to Ralph, "a large fortune means freedom, and I'm afraid of that. . . .I'm not sure it's not a greater happiness to be powerless" (193). Isabel explains to Ralph that she only wants "to be treated with justice" (191), and she seems afraid that money negatively affects that process. Ralph's response is cynical: "you must remember that justice to a lovely being is after all a florid sort of sentiment" (191).

so private that readers learn of it only through Goodwood. When Isabel learns that Goodwood is in Florence (almost two years after their last meeting when he promised to leave Isabel alone for that length of time), she realizes that his presence "implied things she could never assent to—rights, reproaches, remonstrance, rebuke, the expectation of making her change her purpose" (280). When Goodwood admits that he would prefer to consider her "dead" rather than "married to another man," Isabel asserts her own right to happiness: "If you're not happy yourself others have yet a right to be" (277). What is important to Isabel about this situation is the process by which she reached her decision not to marry Goodwood: "she had reasoned the matter well out, making it clear that she broke no faith and falsified no contract" (277). Despite Isabel's requests that he be "reasonable," Goodwood wants an "explanation" for her change of heart because she said, during their earlier conversation, that she probably would not marry anyone. This request angers Isabel, and she asks him if he thinks that she is "bound to explain" (281). Indeed, Goodwood's actions throughout this scene suggest that he does believe that she is bound to him in some way, and Isabel herself suggests this with her concern that she has "falsified no contract." Clearly, he respects the terms of the earlier agreement because he did leave her alone for two years as she requested. However, it is not clear exactly what Goodwood expects in return. In the end, Goodwood leaves, and "no handshake, no sign of parting, was exchanged between them" (281). The fact that they do not shake hands seems significant since shaking hands is a typical sign of assent to a contract or the conclusion of a deal.

This scene is also significant because this is the first time that Isabel speaks about her engagement to Osmond, and thus readers learn of the engagement in an indirect way. Apparently, she wrote Goodwood almost a month earlier to tell him about her engagement, and just as Goodwood must read about the engagement, so, too, must readers of the novel (280). That the reader learns of her choice through Goodwood ties the reader, and the process of reading as judgment, to the question of privacy. Both Osmond and Goodwood are parties to private agreements with Isabel, and these agreements are so private that they are represented by gaps in the text. Though characters in the text sometimes fill those gaps through reading letters or notes, the readers of the text are not able to choose to exercise the privilege of looking over a particular character's shoulder and reading the same text. That is, Goodwood's early relationship with Isabel remains a mystery because the reader never learns the terms of their agreement in Albany, and her association with Osmond follows a similar pattern.

Osmond's marriage proposal and the marriage ceremony itself are private; in a novel about a marriage, it certainly seems strange that the engagement and the marriage contract (the most significant contract and one of the few with obvious legal significance introduced in the text) are not directly presented to the reader. The closest moment to a proposal occurs during Osmond's discussion with Isabel before she leaves Italy to travel for a year. Osmond expresses concern that Isabel might not return to Italy and argues, "you're under no obligation to come back; you can do exactly what you choose; you can roam through space" (261). Here, Osmond plays to Isabel's sense of contract as the freedom to choose; since she is not obligated to anyone, her choices seem unlimited. At the same time, his point that she "can roam through space" indirectly recognizes her

desire for privacy and security. When he tells Isabel that he is "absolutely in love" with her, Isabel cries as she feels a "pang that suggested to her somehow the slipping of a fine bolt—backward, forward, she couldn't have said which" (263). Here, the image of a bolt slipping backward or forward harkens back to the description of Isabel's childhood sanctuary, and once again, Isabel cannot negotiate the need simultaneously to lock the world out and to let the world in. Similarly, she experiences a moment of dread, "a sense of something within herself, deep down, that she supposed to be inspired and trustful passion. It was there like a large sum stored in a bank—which there was a terror in having to begin to spend. If she touched it, it would all come out" (263). Equating emotion to money reflects the link between the person and the property that suggests self-ownership. The simile of money in a bank also reminds us about Isabel's very real fortune, made by a banker and probably literally locked away in a bank.

Osmond does not propose marriage by directly stating his intentions with "will you marry me?" or "I want you to be my wife." Instead, Osmond states: "I've neither fortune, nor fame, nor extrinsic advantages of any kind. So I offer nothing" (264). Indeed, when Isabel suggests that he should leave, he asks her to do him "justice" because he has not "asked anything" of her, "not even a thought in the future" (265). Here, the marriage proposal suggests a non-contract—an offer of nothing, a complete denial of specific terms, and an opportunity for Isabel to write her own terms. However, he does request "a little service"--that Isabel visit his daughter, Pansy, before leaving. Isabel sees this as a "promise" (266), and as she explains to Madame Merle, "I think a

great deal of my promises" (267).[12] Indeed, as we already know, Isabel believes that keeping her promises makes her just.

However, Isabel's faith in promising as a guarantee of justice cannot account for the conditions created when she fulfills her promises. During the early phases of her relationship with Osmond, Isabel also realizes that "one's right was always made of the wrong of someone else" (295). Isabel believes that she is marrying "to please herself" rather than other people (294), and she recognizes that "the passion of love separated its victim terribly from every one but the loved object" (295). Perhaps one motive for her marriage is simply to give herself a direction: "the desire for unlimited expansion had been succeeded in her soul by the sense that life was vacant without some private duty that might gather one's energies to a point" (297). It is important to Isabel that she be "of use to" Osmond (297). She believes that "she could marry him with a kind of pride; she was not only taking, she was giving" (297). However, her belief that marriage creates a private duty seems inconsistent with the idea that she is "giving" something since duty typically suggests an obligation rather than a gift.

Of the marriage itself and its terms, readers learn nothing as the ceremony occurs in another gap in the text, and we hear only that "the thing was done at the little American chapel" with only a few family members present (327). We learn as well that they were "strangely married and it was a horrible life" (323). Further, after her

---

[12] When Isabel visits Pansy at the convent, Pansy refuses to go outside and says, "I have promised Papa not to pass this door" (270). Like Pansy, Isabel cannot pass through the door because her promises bind her. Opening a door is usually a positive image, making a change, some sense of progress. At the end of the novel Isabel puts her hand on the doorknob and pauses for a moment, suggesting a return to the private. A door also represents a barrier, and this is consistent with Mrs. Touchett's view that property erects a kind of barrier.

marriage, Osmond, and not Isabel, is most often presented as the one who judges.[13] Isabel quickly comes to realize that "there was more in the bond than she cared to put her name to" (360). She learns that Osmond does not agree with her sense of justice when Osmond tells her that she had "too many ideas and that she must get rid of them" (359). For Isabel,

> what he had meant had been the whole thing—her character, the way she felt, the way she judged. This was what she had kept in reserve; this was what he had not known until he had found himself—with the door closed behind, as it were—set down face to face with it. (359)

In short, they have completely different views, and to Isabel, "it was strange that people should seek for justice in such different quarters" (361). In this passage, it becomes apparent that Isabel did not write or negotiate the terms upon which their relationship is predicated; instead, they suffer from what seems to be a lack of common terms, particularly in regard to justice.

However, Isabel's relationship with Pansy reveals that Isabel's sense of justice does not differ dramatically from that of Osmond. The parent-child contract between Osmond and Pansy seems quite problematic, but Isabel, even as she asserts her duty to Pansy, defines that duty according to Osmond's terms. Though Pansy is in love with Ned Rosier, Osmond "set[s] a great price" on Pansy and does not believe he is "bound to accept" Rosier's claim that he has Pansy's "promise" (318). When Rosier later

---

[13] For instance, Osmond thinks her relationship with Henrietta Stackpole is a "kind of monstrosity" because Henrietta is both "vulgar" and "abandoned" (328). Isabel, however, protests his interpretation: "against this latter clause of the verdict Isabel had appealed" (328). Here, Osmond pronounces the verdict, and Isabel can only appeal.

encounters Isabel, he asks what Osmond "has been doing to his daughter," but Isabel refuses "to take any interest" (319). Osmond wants Isabel to secure a match between Lord Warburton and Pansy, and Isabel later admits that she "accepted the obligation" (402). Isabel did so because she believes that "if she could make it her duty to bring about such an event she should play the part of a good wife" (348). In order for Isabel to believe that she has been a good wife, then, she needs "proof of it," and creating her own duty will help her provide that proof (348). Further, for Isabel, Pansy's dependence on her "operate[s] as a definite reason when motives threatened to fail her" (341). Isabel tells herself that "we must take our duty where we find it, and that we must look for it as much as possible" (341). Here, Isabel's sense of duty extends both to Osmond and to Pansy, but she cannot please both of them. To use Isabel's language, to "right" one would be to "wrong" the other, and, in any case, the "right" decision is not readily apparent. Though Isabel later explains to Madame Merle that she will "judge" the matter for herself (344), in the end, Isabel follows Osmond's wishes. When Pansy tells Isabel that "No one can think of me as Mr. Rosier does; no one has the right," Isabel argues in reply, "I don't admit Mr. Rosier's right" (392).[14] As Pansy's situation indicates, rights are only worth as much as their recognition by others. Isabel's dilemma here thus highlights the deep-rooted problems in her marriage and in the father-daughter relationship with which she is involved.

---

[14] In *Residues of Justice,* Wai-Chee Dimock points out that Edna Pontellier, who makes a similar claim in *The Awakening,* describes a "nonentity, a 'nobody [who] has any right" (193). This absolute view of rights makes Edna "unintelligible to others" (204). Pansy, described as "a blank page, a pure white surface" (268), may be equally unintelligible, if for somewhat different reasons.

Faced with this dilemma, Isabel tries to determine how she became involved in such a situation. When Isabel wonders if, without Madame Merle, "these things would not have been," she stops herself: "whatever happens to me let me not be unjust. . . .[L]et me bear my burdens myself and not shift them upon others" (340). For Isabel, being just is a central part of what she perceives as her best self: "Her poor winged spirit had always had a great desire to do its best. . . .It wished, therefore, to hold fast to justice" (340). Blaming Madame Merle "would not loosen her bonds" (340). Though a "girl in love was doubtless not a free agent," Isabel believes that "the sole source of her mistake had been within herself" (340).

Near the beginning of her relationship with Osmond, Isabel contemplates his association with Madame Merle; she speculates about "the nature of the tie binding these superior spirits" (211).[15] What Isabel does not understand is Madame Merle's role in Isabel's relationship with Osmond. Though Isabel focuses on the right to privacy, she is unable to fathom Madame Merle's private tie to Osmond: "Isabel found it difficult to think of her in any detachment or privacy, she existed only in her relations, direct or indirect, with her fellow mortals. One might wonder what commerce she could possibly hold with her own spirit" (167). For Isabel, the right to privacy seems to secure a space within which she can define her self, but she has inordinate difficulty recognizing other selves in their private spaces or accounting for relationships between others.

---

[15] It is the "judicious" Madame Merle who suggests that Osmond marry Isabel after she promises Mrs. Touchett to undercut such a relationship. Isabel again adopts courtroom rhetoric as she wants to know Ralph's "grounds" for disliking Madame Merle, and Ralph takes issue at the "charge" (215). Ralph is concerned because Merle's "modesty's exaggerated. She has no business with small claims—she has a perfect right to make large ones (215).)

When Isabel begins to sense the true nature of this tie, she comes to realize that Osmond hates her. Isabel's sense of justice gets even more complicated in this moment as she continues to rely on the courtroom metaphor for justice, yet this conception of justice cannot adjudicate Isabel's claim. When she looks back on her marriage, she believes she had been "just and temperate" (356). For his part, Isabel "knew of no wrong he had done; he was not violent, he was not cruel: she simply believed he hated her. That was all she accused him of, and the miserable part of it was precisely that it was not a crime, for against a crime she might have found redress" (356). Similarly, Isabel realizes that "for physical suffering there might have been a remedy," but "she could come and go; she had her liberty" (360). In stark contrast to her discussions with Goodwood, Warburton, and Ralph, Isabel does not claim a right or allege that a specific wrong has been committed. Instead, the only "right" here refers to interpretation as Isabel realizes that she misjudged Osmond: "she had not read him right" (357).

In light of this misinterpretation, Isabel's promises no longer provide an adequate foundation for justice, and instead she must contemplate the conditions created by her promise. As Isabel considers divorce, "she seemed to see. . .the rapid approach of the day when she should have to take back something she had solemnly bestown" (386). Here, we are reminded of Isabel's earlier statement that she takes her promises seriously. For her, anything, even ignoring Ralph on his deathbed, seems "preferable to repudiating the most serious act—the single sacred act—of her life" (386). Isabel feels that such an action would take on the character of the absolute because "to break with Osmond once would be to break for ever" (386).

Isabel finally confides in Henrietta Stackpole about some of her marital problems. When Henrietta suggests that Isabel simply leave Osmond, Isabel emphasizes not her promise but her privacy when she argues that she cannot "publish her mistake" (407). Isabel argues thus: "One must accept one's deeds. I married him before all the world; I was perfectly free; it was impossible to do anything more deliberate. One can't change that way" (407). Isabel's description here of her marriage seems inconsistent with the earlier description; indeed, Isabel's marriage ceremony is not directly represented and certainly does not take place before "all the world." Instead, her marriage ceremony is conspicuous by its very absence. While this highlights the private character of marriage, it also suggests the inability to read, literally, the contents of their contract, yet the promise she must have made to Osmond continues to influence her actions. Henrietta later asks Isabel to "promise" to leave Osmond "before the worst comes," but she refuses (417). Isabel argues: "I can't do that. I shall never make another promise. I made such a solemn one four years ago, and I've succeeded so ill in keeping it" (417).

Osmond also focuses on Isabel's promise and reads the terms of their marriage as absolute and beyond negotiation. When Isabel tells him that she needs to visit Ralph before he dies, Osmond initially emphasizes his preference rather than her obligation—he "shall not like it" if she goes. Isabel, however, wants to present her reasons and believes justice requires that he hear those reasons; she tells him that he seems "unjust" because she has "every reason for going" (445). Osmond in response asserts their marriage contract; for him, they are "indissolubly united" (446).[16] Osmond argues: "I think we

[16] Osmond explains his view of the marriage contract to Goodwood: "We're as united. . . as the candlestick and the snuffers" (420).

should accept the consequences of our actions, and what I value most in life is the honour of the thing" (446). Isabel views this as "a kind of appeal," and his words represent "something transcendent and absolute, like the sign of the cross or the flag of one's country" (446). She senses at the same time that his claims are "blasphemous sophistry" as "her old passion for justice still abode within her" (446). However, it is this passion that almost "promised him victory" (446). When Isabel thinks about what she is going to do, "it seemed to her that only now she fully measured the great undertaking of matrimony. Marriage meant that in such a case as this, when one had to choose, one chose, as a matter of course, for one's husband" (449).

However, something clearly changes Isabel's mind, for she does choose to visit Ralph rather than to obey her husband. In the last section of the novel, the right to privacy becomes most significant. Though Isabel had wondered at "the nature of a tie binding such superior spirits," Isabel does not become suspicious about the relationship between Osmond and Madame Merle until she sees them together in a private moment. Isabel finally understands that Madame Merle "was a powerful agent in her destiny" when Isabel "happened to be struck with the manner in which the wonderful lady and her own husband sat together in private" (428). According to Countess Gemini, Madame Merle and Osmond have "always been bound to each other. . .[;] they made a bargain that each should give the other complete liberty, but that each should also do everything possible to help the other on" (455).[17] As it turns out, as Pansy's real mother, Madame

[17] Madame Merle also tells Osmond: "There's something after all that holds us together" (436). For Madame Merle, their connection borders on the criminal. She asks him: "How do bad people end?—especially as to their common crimes?" (434).

Merle, "to save her skin, renounced all visible property in the child" (452). Madame Merle's tie to Pansy is, arguably, the most private tie of all—a blood tie.

Private ties also call to mind Isabel's mysterious tie to Caspar Goodwood. When Isabel learns that he is in Rome, she remembers their connection but, once again, does not indicate the basis of this obligation. Isabel believes that he "represented the only serious harm (to her belief) she had ever done in the world; he was the only person with an unsatisfied claim on her" (404). Though she recalls that their last meeting before her marriage "had had quite the character of a complete rupture," Goodwood continues to represent "an account still to be settled," perhaps because "he had invested his all in her happiness" (405). Unlike Warburton, Goodwood has no "compensations" for "having failed to marry" her (404). After her marriage, Isabel does not write to him because she feels that "considering his grievance, the least she could do was to let him alone" (405). Once more, Isabel honors privacy. When they reunite, Isabel asks him "to render her a service" even though she does not think she has the "right" to ask (412). Goodwood claims that she is "the person in the world who has the most right" (412). The source of these rights is unclear because the rights themselves seem predicated on a private tie.[18] Goodwood again professes his love for Isabel and tries to get her to explain the true nature of her marriage: "I've got no right to say that, I know; and you've no right to listen" (426). In contrast to earlier assertions of rights, these rights are negative, no-rights that do not depend on a standard of justice for their articulation. A no-right cannot be

[18] Goodwood later tells Ralph that he had been watching Isabel for signs of her happiness because he believes he "had the right" (416). Again, Goodwood seems unwilling to recognize Isabel's desire for privacy, as this is the very action that she complained about during an earlier meeting. Goodwood complains that he has not "come near" Isabel, but she tells him that he has "come very near" (425). Isabel explains that she "knew" that he loved her "as soon as he consented to go" (426).

owned, exercised, or judged, and this exchange echoes Pansy's earlier claim that "no one has the right" to think of her as Ned Rosier does (392).

Against this backdrop, Isabel invokes the language of the courtroom to justify her decision to go to Ralph, and she does arrive just before his death. When he asks Isabel to stay in England, she agrees to stay "as long as it seems right" (479). After he dies, Isabel justifies her decision to stay by telling "herself that it was but common charity to stay a little with her aunt" (481). Isabel's situation is also described as a "case" in which one needs an "excellent motive" (481). Indeed, Osmond "was not one of the best husbands, but that didn't alter the case. Certain obligations were involved in the very fact of marriage, and were quite independent of the quantity of enjoyment extracted from it" (481).

As Isabel contemplates the nature of those obligations, Goodwood appears and offers to help, at least partially because Ralph asked him to do so. Goodwood argues his case by appealing to Isabel's sense of justice: "a woman deliberately made to suffer is justified in anything in life" (488). Goodwood states:

> We can do absolutely as we please; to whom under the sun do we owe anything? What is it that holds us, what is it that has the smallest right to interfere in such a question as this? Such a question is between ourselves—and to say that is to settle it. Were we born to rot in our misery—were we born to be afraid?. . .The world's all before us—and the world's very big. (489)

Goodwood thus presents a tie that will trump Isabel's marriage contract and all external judgments since nothing has the smallest right to interfere. By thus placing the question between them, Goodwood also relies on privacy.

However, the world here is "big," and that is, perhaps, what Isabel finds most problematic. When Goodwood kisses her, she feels "each aggressive fact of his face, his figure, his presence, justified of its intense identity and made one with this act of possession" (489). Isabel runs for the house and pauses at the door: "she looked all about her; she listened a little; then she put her hand on the latch" (490). Here it is significant that Isabel touches the latch rather than the knob, for the latch reminds us again of her reliance on barriers to protect her privacy. Just as Isabel left Albany and her private sanctuary to escape her tie to Goodwood, she now must return to a different private space to escape him once again.

Indeed, Isabel continually relies on property to protect her privacy. In an earlier conversation with Madame Merle, Isabel contends that property creates a "barrier" that offers protection. Madame Merle claims that property is an extension of the person:

> When you've lived as long as I you'll see that every human being has his shell and that you must take the shell into account. By the shell I mean the whole envelope of circumstances. There's no such thing as an isolated man or woman; we're each of us made up of some cluster of appurtenances. What shall we call our 'self?' Where does it begin?

> Where does it end? It overflows into everything that belongs to us—and then flows back again. (175).[19]

Isabel, however, does not "care to be judged by that" and disagrees, claiming, "I don't know whether I succeed in expressing myself, but I know that nothing else expresses me. Nothing that belongs to me is any measure of me; everything's on the contrary a limit, a barrier, and a perfectly arbitrary one" (175). For Isabel, the barriers created by property protect the self rather than express the self, and this is perfectly consistent with her girlhood sanctuary with its bolted doors and paper-covered windows and her final flight away from Goodwood.[20]

Isabel's final choice to flee Goodwood and return to Italy perplexes most readers, and the ambiguity of this ending calls our attention to the nature of interpretation itself.[21] Though the narrator tells us that the "reader will know more than Isabel ever will" (332), this claim seems questionable at best. Clearly, Isabel knows the content of her ties to both Goodwood and Osmond while the reader is denied that information. Indeed, it is difficult to determine what, if anything, the reader knows that Isabel does not. What is

---

[19] Isabel's inheritance changes the way she sees her relationships with Warburton and Goodwood. When Isabel later thinks back on their proposals, she sees the "revival" of the past as "show[ing] the livid light of a judgment-day" (194); for Isabel, forgetting is a "liberty." However, her new financial status seems to change her feelings about both men; "she had not given her last shilling, sentimentally speaking, either to Caspar Goodwood or to Lord Warburton, and yet couldn't help but feel them appreciably in debt to her" (194).

[20] In "Property's Portrait of a Lady," Miranda McGowan draws on Locke's and Hegel's accounts of property and its relationship to identity to argue that *The Portrait of a Lady* "highlights the tensions between the two conceptions" (1040). McGowan links Isabel Archer's "emphasis on the individual, freedom, autonomy, and change" to Locke's theory; in contrast, Madame Merle and Gilbert Osmond, given their recognition that "the property a person owns mediates his relationship to society," follow Hegel's view (1059).

[21] Millicent Bell argues that "her fate, still uncommitted, must, by the structure of the novel, remain open" (783).

made clear through the representation of privacy is that Isabel and the reader know different things, and judging Isabel's choices becomes complicated by that difference. Reading Isabel "right," then, involves the recognition that, on some level, we are simultaneously reading her "wrong."[22] Perhaps Ralph says it best when he tells Isabel that "there is no more usual basis of union than a mutual misunderstanding" (129). Indeed, mutual misunderstanding characterizes many of Isabel's agreements with others, particularly those that involve her claim for the right to privacy. Even as Isabel seeks the self-representation as a just person, she does so on the very private ground that depends on an abstract version of contract and denies recognition by others.

"James' 'thin guarantee': Relational Contracts and Aesthetic Representation in *The Wings of the Dove*"

In *The Wings of the Dove,* James revisits many of the issues he explored earlier in *The Portrait of a Lady.* Indeed, Shelia Teahan suggests that *The Wings of the Dove* "reactivates the Gilbert Osmond plot of *The Portrait of a Lady* with Milly as a conflation of Ralph and Isabel, both dying heiress and marriageable heroine" (205). However, I would like to call attention here to a different link and then go on to suggest several fundamental differences between the two novels. Once again, James employs legal discourse to investigate the intersection of market-related and ethical issues and to formalize his relationship with his audience. However, while *The Portrait of a Lady* calls attention to who gets to write or rewrite the terms of an exchange, an exchange that often

[22] In "Beyond the Frame of *The Portrait of a Lady,*" Lee Clark Mitchell argues that "James suggests that we construct ourselves through the plots we submit to and into which we weave others" (98). Mitchell also

remains private, *The Wings of the Dove* moves beyond the realm of specific rights and privileges to dramatize a complex web of relationships that can no longer be measured as discrete exchanges and that take place entirely in public. This shift in concerns is also indicated in James' description of his aesthetic practice. While *The Portrait of a Lady* formalizes the relationship between reader and text by opposing the reader's right to the privilege of point of view and then undoing that very opposition, *The Wings of the Dove* does not provide such a formal account of rights and privileges. Instead, in the Preface to the New York Edition of *The Wings of the Dove*, James advises readers to approach the novel's subject as one that "might have a great deal to give, but would probably ask for equal services in return, and would collect this debt to the last shilling" (35). James here describes an aesthetic transaction by using contractual language to suggest a discrete, equivalent exchange between the reader and his text; however, *The Wings of the Dove* undermines this version of discrete exchanges by staging the tension among different models of contract and the conceptions of justice that flow from those models. As James negotiates this tension, he performs on what he describes in the Preface as a "thin guarantee" (46). Indeed, the "poor author's. . .thin guarantee" can seem, at the very least, "an abuse of privilege" when, according to one example, "Milly's situation ceases to be 'renderable' in terms closer than those supplied by Kate's intelligence, or, in a richer degree, by Densher's" (46). Thus, James' promise of an equal exchange turns out to be but an offer of a "thin guarantee" that does not adjudicate among the relations it invokes. Rather than references to specific rights and privileges, a general "we" often encapsulates

---

points to the ways in which "the reader is coerced into questioning responses that align him or her with characters in the novel" so that "selfhood is produced as a mutual process of cross reading" (109).

the connection between the reader and the writer, a "we" that further displaces agency so that the passive consent illustrated by *The Portrait of a Lady* becomes even more ambiguous in *The Wings of the Dove.*

The legalistic spirit of James' Prefaces, as I have noted before, suggests that law is an important discourse that illuminates his aesthetic practice. For instance, as he explains in *The Art of the Novel,* the novelist's task is to present the "superior case," "to create the record, in default of any better enjoyment of it: to imagine, in a word, the honourable, the producible case" (222-23). As James creates that record in *The Wings of the Dove*, he again utilizes legal discourse, particularly the language of contractual obligation, to describe relationships among the characters; some memorable examples include, to mention but a few, the strange opening scene in which Kate Croy and her father negotiate the terms of their future relationship and Kate describes her aunt's offer, the "rich compact" Kate and Merton create, and the "beautiful basis" on which Kate and Milly ground their relationship. As these few examples suggest, in *The Wings of the Dove*, almost all of the relationships involve contracts in one way or another, and, in this way, the novel intersects with contemporary legal debates about contract law.

Briefly put, classical contract theory, at its heyday in the late nineteenth century, suggests that a contract reflects a discrete exchange between autonomous, self-interested individuals who, in turn, should be bound to the terms of the exchange simply because they voluntarily assented to the terms. Thus, the justice of the contract inheres in the promises exchanged. Even as classical contract theory reached its ascendancy, both court decisions and legal theorists began to critique its limitations and to propose alternative versions of contract that take into account the fairness of the exchange by asking

questions about who benefits from or relies upon a particular exchange. More recently, legal theorists have traced a relational model of contract that emphasizes modification of the parties' rights and responsibilities over time so as to accommodate long-term relationships that cannot be accurately described as discrete exchanges of equivalent value. Indeed, a relational model focuses not so much on the value of a particular exchange as the ways in which exchanges tend toward maintaining the relationship itself.

Like the representation of contracts in *The Portrait of a Lady,* many of the agreements dramatized in *The Wings of the Dove* emphasize promising and suggest that the promise itself justifies the contract, just as does the classical model of contract; however, these agreements play out in a text that undermines the classical model by positing instead a relational conception of contract, mirrored also in James' aesthetic transaction. Indeed, *The Wings of the Dove* stages the tension between the classical model of contract that tends to view a contract as a discrete exchange in which autonomous parties mutually agree to fulfill specific obligations and a relational model of contract that, instead, emphasizes the adaptation of the parties' rights and obligations in response to changing circumstances and suggests that the parties' relationships cannot be measured as discrete exchanges.

In an effort to particularize further this discussion of the exchanges that form James' richly complex text, I will draw on the work of Theophilus Parsons. Parsons uses the example of a parent-child contract to emphasize the duties created by contracts. He further suggests that to interpret these "implied" contracts, we must "look to common principles" which suggest that contract is "commensurate with duty" (4). By linking contractual obligation with duty, Parsons suggests that something other than the self-

interested motives ascribed to the parties by classical contract theory can account for obligations to others. As Parsons' work on contracts indicates, even parent-child relationships are contractual, and in this respect, *The Wings of the Dove* significantly revises the representation of parent-child relationships in *The Portrait of a Lady.* Both novels begin with a family contract, of sorts, in which both Isabel and Kate look to a contract as a way to provide a fresh start and thus enter contracts with their aunts as a way to secure their futures. As I suggested earlier, Isabel begins with a clean slate; her parents are dead, and she seems free already from the kinds of status-based restrictions that classical contract theory attempts to eliminate. Thus, Isabel's decision to negotiate with her aunt represents an act of choice. In contrast, a parent-child contract is exactly what is at issue as *The Wings of the Dove* opens with Kate Croy waiting to meet with her father, Lionel Croy, to discuss her Aunt Maud's "proposal" (64), a proposal that would require Kate to "break off all relations" with her father (62). The site of Kate's negotiation with her father also points to an important shift in James' thinking about contracts since *The Portrait of a Lady.* While Isabel Archer initially meets her aunt in her private, girlhood sanctuary, Kate Croy waits for her father in a "vulgar little room" (55). Indeed, in contrast to the bolted doors and green paper that secure Isabel's private space, the room in which Kate eventually meets her father "constituted quite the publicity implied by such privacies" as suggested by "the narrow black housefronts" (55). As the opening scene suggests, most of the novel takes place in spaces that seem more public than private.[23] Thus, the site of the exchanges itself indicates a significant shift away

[23] Writing about the same scene, Lee Mitchell points out that "private and public spheres in this novel will be inextricably linked, and their initial reflection of each other establishes the extent to which others define one's world" ("Sustaining Duplicities" 189).

from classical contract theory's attention to private contracts negotiated between two parties.

The specific language used in this scene also calls to mind classical contract theory; however, the fact that the language describes a parent-child relationship highlights many of the limitations of that theory. One common criticism of classical contract theory is that, by assuming autonomous agents similarly situated in equal bargaining positions, it overlooks the material conditions that shape exchanges and ignores the very real constraints upon the hypothetical freedom and autonomy it presumes. James invokes this critique when he begins the novel with a telling line: "She waited, Kate Croy, for her father to come in, but he kept her unconscionably" (55). The characterization of Lionel Croy's actions as unconscionable provides a key insight into the dynamic at work in this scene. According to late nineteenth-century contract law, one important, if seldom invoked, check on power of the parties to create the terms of their contract is the doctrine of unconscionability. That is, when this doctrine is invoked, a court can override the terms of the contract because it is "unconscionable" (Atiyah, *Introduction* 319). More specifically, a contract or a specific provision can be considered unconscionable when "one party has extracted an extortionate and grossly unfair bargain, by taking advantage of the other in some way" (Atiyah, *Introduction* 319). Thus, the doctrine allows courts to justify considering the fairness of the exchange itself and the respective bargaining positions of the parties. By suggesting that Lionel Croy "kept" his daughter "unconscionably," James prepares the reader for the complicated father-daughter relationship that influences many of the other relationships in the novel and

calls attention to the justice of that relationship. Indeed, James suggests that Lionel and Kate are not equal parties who negotiate a disinterested exchange characteristic of market-oriented transactions.[24]

Kate herself recognizes that she is not on entirely equal footing with her father because "no relation with him could be so short or so superficial as not to be somehow your hurt" (57). However, despite admitting "the futility of any effort to hold him to anything" (57), Kate attempts to do just that by pledging "I'll go with you. . .anywhere" (60). When Lionel refuses Kate's offer to go with him rather than her aunt, Kate counters by invoking their relationship as parent and child to suggest that her motives may not be entirely self-interested: "Don't put it to me therefore as monstrous that the fact that we're after all parent and child should at present in some manner count for us" (63). She continues in specifically contractual terms, that, even as they mimic classical contract's attention to a specific moment of offer and acceptance, highlight the inability to measure her offer as a discrete exchange: "I don't make out your life, . . .but whatever it is I hereby offer to accept it. And, on my side, I'll do everything I can for you" (63). To reiterate the significance of her offer, she also provides a more specific interpretation of Aunt Maud's condition: "you shall simply cease to exist for me" (64). Though he sarcastically recognizes that Kate has been asked to "sign" "a cruel invidious treaty," Lionel Croy again rejects Kate's offer and instead calls attention to Maud's promise itself when he asks: "But what are her promises? Just what does she engage to do?" (64).

---

[24]In contrast to some critics who view Kate as the villain of the novel, Lee Mitchell instead examines the constraints on Kate's choices. In "The Sustaining Duplicities of *The Wings of the Dove,*" Mitchell cautions against assuming that Kate "acts with autonomous freedom, much less that she warrants our condemnation" (187). For Mitchell, then, the novel puts "possibilities for choice in motion even as it disables them" (190).

Indeed, he urges Kate, "you must work it, you know" (64). He then provides his own version of a parent-child contract: "Your duty as well as your chance. . .is to use me. Show family feeling by seeing what I'm good for" (65). The terms of the parent-child relationship shift several times within this scene so as to denote both market-based issues as well as broader, more ambiguous ethical issues. Here, the parent-child contract produces both a duty and a chance—a chance that, like the contract that creates, represents an opportunity that, in turn, is characterized by its very uncertainty. The "game of diplomacy" playing out in this scene highlights this sense of uncertainty (57). For Kate, her father "dealt out lies as might the cards from the greasy old pack for the game of diplomacy to which you were to sit down with him" (57-58). The negotiations here share more in common with a card game, a game of chance, than the specific terms of the "cruel invidious treaty" that Kate must "sign" (64).

By agreeing to do her duty by renouncing her father, Kate accepts the terms of Aunt Maud's offer, and this agreement affects the terms of each of the other agreements Kate enters, particularly those concerning Merton Densher. Like Kate's father, Merton is, among his many accomplishments, also "credulous for diplomacy" (86), and like her relationship with her father, Kate's relationship with Merton is also characterized by a complicated exchange that reflects both market-related and ethical claims. Their exchange simultaneously structures and is structured by the other exchanges to which they are parties. For instance, even as Kate and Merton exchange "vows and tokens, sealed under their rich compact" that they will "belong only. . .to each other" (117), they

recognize that this compact impinges on Kate's agreement with Aunt Maud.[25] Like Isabel Archer, Kate also asks her aunt's permission to see her suitor even as she professes her autonomy. Though Kate proclaims herself "honourably free," she does "go through the form of asking her [Aunt Maud] leave" to see Merton (91). Aunt Maud's consent compels Kate to wonder what "strange interest" Maud takes "in their keeping on terms" (92); indeed, Kate "wonder[s] most" about "the implication of so much diplomacy in respect to her own value" (92). Given the series of exchanges to which Kate is a party, it is difficult to determine just what her value is, in terms of a discrete exchange, in any particular transaction. Indeed, these exchanges are embedded within a complicated web of relationships that undermines the ability to measure the value of any particular exchange without reference to another, related exchange. Since Maud has "demanded. . .no promise" from Merton about Kate, they believe that they can manage their engagement and "yet remain loyal" to Kate's bargain with Maud (117). For Merton, as long as Maud's "view" is "general," they do not "deceive" her; however, when Maud presents her "particular" view to Kate, their engagement will likely represent a deception (117). As Merton points out, in the second case, "one doesn't quite make out what we shall have got from her" (117). For Kate, the answer is obvious: "we shall have gained time" (118). According to Kate, Maud "must take her risks," and whatever Maud gets

[25] The exact nature of Merton's and Kate's relationship seems complicated from the start; though Merton apparently assumes enough to propose marriage, it is, for Kate, "too soon" (93). More specifically, "they had accepted their acquaintance as too short for an engagement, but they had treated it as long enough for almost anything else, and marriage was somehow before them like a temple without an avenue" (93). Though the "diagnosis of a stranger" might suggest that they are engaged, "the desire to keep them just as they were had perhaps more to do with the fact that. . .there had been for them as yet no formal, no final understanding" (93). Indeed, the "relation" between them "abounded in such oddities" (87), including Kate's suggestion that their "relation" could be described best "in the terms of the housemaid and the baker" and that the terms of this relation "represent, technically speaking, alike the range and the limit of their tie" (91).

from them "is her own affair—it's for her to measure" (118). Indeed, as the various agreements among Kate, Merton, and Maud suggest, any given exchange can be measured from a number of perspectives that establish links to other exchanges that thus complicate attempts to measure value in terms of a specific, discrete exchange.

Another set of intricate relationships involves Milly Theale, whose visit to London, along with her companion Susan Stringham, alters significantly the relationship between Kate and Merton. First, however, it is important to understand the terms of Milly's relationship with Susan. Of all the complicated relationships in the novel, Milly and Susan's seems to be one of the most straightforward—that of employer and employee. Susan Stringham is also one of the few characters who actually works for a living. Like Merton, Susan has literary ambitions, though she acts as Milly's companion. Though they seem more like friends than employer and employee, Milly asks if Susan will go to Europe with her "at the earliest possible date" and "without making conditions" (127). When Susan accepts this "proposal," they enter "a new personal relation" (122). Like many of the exchanges presented in the novel, this exchange also conflates market related claims and ethical claims; for Susan, "service was so easy to render that the whole thing was like court life without the hardships. It came back of course to the question of money." (133). Indeed, this bond suggests both Susan's apparently genuine feelings for Milly and her economic compensation for her services.

Merton Densher also plays a curious role in Milly's decision to leave America. At first, Susan resists Milly's proposal and points out that there "they have no relation already formed" abroad (142). When this tactic does not work, Susan realizes she must

"go all the way" and ask Milly whether or not she "gave Merton Densher something of a promise" when they met earlier (142). When Milly offers only a "vague" response, Susan comes to understand that "she really couldn't be so vague about the promise. . .without attaching it to something; it had to be a promise to somebody in particular in order to be so repudiated" (142). Some prior relationship with Merton, then, seems to influence Milly's decision to visit London. Indeed, "there had been just enough in this relation to meet, to provoke, the free conception of a little more" (143). Like Caspar Goodwood's mysterious tie to Isabel Archer, Milly's promise to Merton, if it even exists, remains a mystery. Whatever its content, this promise seems even more tenuous than Goodwood's tie to Isabel because, unlike Goodwood, Milly and Merton seldom refer to their previous connection, though it does form part of the complicated web of exchanges to which they are parties.

The context within which Milly meets Kate itself suggests that relations are always embedded within other relations. After Susan draws on her childhood friendship with Maud Lowder to acquire a social foothold for Milly, Milly wonders if Maud's history "had already sketched a relation" that would determine her relationship with Kate: "were they, Miss Croy and she, to take up the table where their two elders had left off so many years before?" (149). Here, the connection between Kate and Milly already had a history linked to that of Maud and Susan. As Lord Mark points out, Milly could very well be a present, of sorts, from Susan to Maud, and his observation leads Milly to wonder about the role of such preexisting ties. When Milly notices Kate watching her talk to Lord Mark, Milly wonders if Kate can guess Lord Mark's effect and if "that represent[s], as between them, anything particular, and should she have to count with

them as duplicating, as intensifying by a mutual intelligence, the relation into which she was sinking?" (156). What seems striking about this passage is James' use of pronouns. Indeed, "them" could refer to Lord Mark and Kate, Milly and Kate, or even Milly and Lord Mark; this ambiguity makes it difficult to contemplate any of these relationships as discrete exchanges, despite the connection to economic, market-oriented issues that are typically accounted for as discrete exchanges. In a famous passage, Lord Mark assures Milly that Maud will "get back. . .her money" because "nobody here. . .does anything for nothing" (157). Though Lord Mark's statement highlights the prevalence of economic bargains, his attention to money as the measure of value obscures the ways in which these bargains often undermine attempts to describe their value in specific terms. Milly herself recognizes "the various signs of a relation" that sometimes defy interpretation so that the relations themselves cannot be measured according to typical calculations of value (157).

Kate's relationship with Milly epitomizes the difficulty in measuring such complicated bonds. Their first interaction revolves around the gifts Milly gives to Kate:

> there were objects of value she had already pressed on Kate's acceptance. . . .A week of her society in these conditions. . .announced itself from an early hour as likely to become a week of presents, acknowledgements, mementos, pledges of gratitude and admiration, that were all on one side. (168).

Though Kate vows to "forswear shops" until she receives Milly's "guarantee" that she will not acquire the shop's contents for Kate, Kate does not, as the narrator notes, make this request until "she had found herself in possession, under whatever protests, of several precious ornaments and other minor conveniences" (168). Despite Milly's apparent

generosity, she does expect to get something in "definite 'return'"—"to be told a little about Lord Mark and to be promised the privilege of a visit to Mrs. Condrip [Kate's sister Marian]" (168). Thus, Milly's gift carries the same kinds of expectations typically associated with a contractual exchange; Milly clearly wants information from Kate. Kate, for her part, is at a loss as to how to explain Lord Mark to Milly, and her difficulty comes from her inability to account for his value: "she could think of no other case of a value taken as so great and yet flourishing untested. His value was his future. . . ." (169). As Kate understands it, "he was working Lancaster Gate for all it was worth: just as it was, no doubt, working *him*, and just as the working and the worked were in London, as one might expect, the parties to every relation" (169 emphasis in original). However, Kate describes this to Milly in more general terms: "everyone who had anything to give—it was true they were the fewest—made the sharpest possible bargain for it, got the least value in return" (169). Yet, this arrangement "might be in cases a happy understanding. The worker in one connexion was the worked in another" (169). Here, gifts further complicate the idea that an exchange may be viewed as discrete as, for both Kate and Milly, gifts seem to create an ongoing relationship lacking clear terms; more specifically, when Kate receives a particular gift, she accepts it without knowing what she will be asked to do in return. Similarly, Kate refuses to discuss "Milly's own 'paying' power," and instead they find "a beautiful basis": "that Milly would pay a hundred percent" (170). The exact terms, however, of this "beautiful basis" cannot be adequately accounted for as a discrete exchange.[26] Indeed, Kate provides another, quite different, gloss on their

[26] Several critics have commented on Milly's value. According to Nicola Bradbury, Milly's value comes from her ability to escape represention: "through the paradox of absence, . . .Milly (and all she stands for) is more powerful, pure and true, than in mere presence" (87). For Kevin Kohan, however, Milly's "value is

relationship when she questions Milly: "Don't you ask a good deal. . .in proportion to what you give?" (204). Here, gifts help to establish and maintain a particular relationship.

However, the justice of the relationships created becomes difficult to analyze in the absence of a promise to articulate the content of a particular exchange that helps to structure a given relationship. Indeed, these exchanges cannot be evaluated without referring to another exchange and another and so on with the effect that any account of these multifaceted relationships tends to fold back upon itself to create a sense of stasis and to suggest that we never really "get anywhere" in this morally ambiguous world. Consequently, justice becomes difficult to define because its meaning shifts with its repetition throughout a particular relationship. For instance, when Kate and Milly reach their "beautiful basis," Milly initially thinks that "what had passed was a fair bargain, and it would do" (205). However, Milly then revises her interpretation and wonders "if Kate Croy had been playing perfectly fair" (218).[27] What seems fair, then, changes over the course of their relationship, and justice thus becomes fluid and oftentimes unstable. Indeed, as the narrator points out about Milly's association with Lord Mark, "neither justice nor injustice was what had been in question between them" (187).

---

transitory, formal, and entirely exchangeable" (138). Kohan argues that Milly does not represent the "present/absent center" of the text as many deconstructionist critics suggest; instead, the novel subverts such readings because Milly "becomes a metaphor of a metaphor" since "the reader is given the critical distance to observe the positing of a transcendental figure (constructing Milly as an absolute center) and the re-writing of the figure deconstructively" (138). He continues, "once posited as the center and then erased there as an arbitrary sign, Milly is shown to rule a debased world of appetite and consumption" (138).

[27] Merton's complicated role in Milly and Kate's relationship also becomes apparent as, in another example of just how complicated these relationships really are, Maud apparently tells Susan to tell Milly that she should not tell Kate about her earlier acquaintance with Merton (174). As Kate's earlier reference to Aunt Maud suggests, Kate and Milly's relationship also involves Aunt Maud: "she [Milly] would have something to supply, Kate something to take—each of them thus, to that tune, something for squaring with Aunt Maud's ideal" (231).

The issue of fairness shapes many critical discussions of the novel; however, many such discussions implicitly invoke a kind of justice as absolute judgment that James seems to destabilize. Many critics judge Kate's conduct and convict her for a variety of wrongs. For instance, Wayne Booth's brief summary of the novel's storyline aptly illustrates such critical views. Booth writes, "the touching account of Milly Theale's betrayal seemed to nag me about the fundamental difference between those like Kate Croy who comfortably use others, and those like Milly who know how or learn how to find their life by living with and even for others" (110). However, Booth's account misrepresents Kate's case, and his comment about Milly could, at least partially, apply to Kate as well, particularly given the constraints on her choices such as her family obligations that James carefully delineates in the opening scene. Janet Gabler-Haver also indicts Kate because she "deceives other characters about the reality of their mutually shared social universe by the evasive and misleading tactic of silence" and shifts "the responsibility for her sophistry to Densher" (176). Others see Milly as the victorious character because she escapes the text. As Nicola Bradbury explains, "Milly is triumphant, not because she has bested Kate in death, but because she has escaped all systems" (96). Similarly, Kristin King suggests that Milly "is both intangible essence and central image" (4) and that "Milly's death fulfills James' most powerful use of absence—woman as the margin that defines others" (5). On the other hand, some critics take Milly to task for her complicity in her own fate. As Kumkum Sangari puts it, "if Kate is the worker, then Milly is willing to be worked" (293). "Her victimization," Sangari continues, "is assisted by qualities within herself" (293). However, Sangari does recognize what many overlook—the duality of the major characters: "Milly is both

corruptor and victimized; Kate and Densher are both conspirators and abjects cornered into desire by money" (294). Sangari's attention to the ways in which the characters' roles constantly shift comes closer to appreciating James' rendering of justice as fluid than those critical approaches that judge a particular character as good or bad.

The famous bargain in which Kate eventually agrees to come to Merton sexually in exchange for this courtship of Milly Theale certainly figures prominently in such critical deliberations. About halfway through the novel, Merton and Kate reach a new understanding. Though Kate suggests that Milly is dying and may want to make a good marriage, she does not directly explain what she has in mind. Instead, she asks Merton "you do then see your way?" (290). Then she makes "him understand she meant his way with Milly" (290). What Kate means here coincides with what Aunt Maud means as well. Indeed, Aunt Maud also plays a role in this exchange when she reminds Merton that Milly's "fortune's a real fortune" (293). Merton realizes that Maud was "buying him off, and buying him. . .with Miss Theale's money" (293). When Merton merely thanks her for the "offer" (293), she points out that she has already "told the proper lie" for him and that she now expects him to make her "right" (294). Thus, it is by this "diplomatic" lie that "Milly was successfully deceived" (294). Merton eventually realizes that "three women were looking to him at once" and that the situation had "its immediate workable law" (368).

Indeed, a "workable law" aptly describes the terms that evolve from most of the contractual agreements presented in the novel. For instance, Kate and Merton further clarify the terms of their agreement later in the text, and Merton explicitly describes the plan when he asks Kate "since she's to die I'm to marry her?" (394). Kate confirms his

interpretation and adds, "you'll in the natural course have money. We shall in the natural course be free" (394). In one of the most memorable scenes in the novel, Kate promises to come to him sexually in exchange for his courtship of Milly; Merton offers, "I'll stay [with Milly] on my honour, if you'll come to me. On your honour" (397). The value of their exchange seems difficult to quantify: "He had in fine judged his friend's pledge in advance as an inestimable value, and what he must now know his case for was that of a possession of the value to the full. Wasn't it perhaps even rather the value that possessed him?" (400). As he contemplates performing his end of the bargain, he feels "the force of the engagements, the quantity of the article to be supplied, the special solidity of the contract, the way, above all, as a service for which the price named by him had been magnificently paid, his equivalent office was to take effect" (400-1).

Yet, the bargain plays out so as to deny such equivalences. Indeed, the novel concludes as Merton asks Kate to "choose," presumably between him and Milly's money, during the following exchange:

> "I'll marry you, mind you, in an hour."
>
> "As we were?"
>
> "As we were."
>
> But she turned to the door, and her headshake was now the end. "We shall never again be as we were!" (509)

Kate's famous last line seems to end their relationship by pointing out that they cannot return to the terms of their previous alliance. However, unlike Isabel Archer's flight from Caspar Goodwood, Kate merely turns to the door, and James does not provide a definitive ending as we do not see Kate actually leave the room even as her headshake

does seem to provide a definitive conclusion to their bargain. Thus, their relationship cannot be structured by a clear-cut beginning and ending, a promise and a performance. Indeed, just as it has throughout the novel, their relationship continues to change in a way that undermines the very promises upon which it seems to be predicated and, in turn, the justice presumed inherent in those promises.

In this last sense, then, Kate's statement also provides a gloss on the version of justice, associated with Milly Theale, as an act of measurement and valuation. Early in the novel, the narrator suggests that for Milly, "to see her life put into the scales represented her first approach to the taste of orderly living. Such was Milly's romantic version—that her life. . .was put into the scales" (206). This characterization of Milly's romantic version of her life is strangely reminiscent of James' use of the image of scales in the Preface to *The Portrait of a Lady* to describe his decision to focus on Isabel's consciousness. James writes that he told himself to "stick to that—for the center; put the heaviest weight into that scale, which will be so largely the scale of her relation to herself" (11). Here, James describes a relation that can be accordingly weighed and measured, a task that when proposed by Milly Theale seems romantic.

In *The Wings of the Dove* both Kate and Milly associate justice with measurement but in slightly different ways. Kate's famous last line suggests, temporally speaking, that fulfilling a promise cannot put the parties into the positions for which they bargained and, in the event of a breach or changed circumstances, that the exercise of justice cannot return the parties to the exact positions they once occupied. Milly, in turn, provides a spatial image of justice as scale upon which competing claims are weighed, measured, and adjudicated accordingly. Susan Stringham echoes Milly's account by suggesting that

Milly herself can be produced as evidence, "as something to show," to counter Maud Lowder's pity. For Susan, "whatever Mrs. Lowder might have to show—and one hoped one did the presumptions all justice—she would have nothing like Milly Theale" (146). Indeed, their "case" can be "settled" "by the happy consummation, the poetic justice, the generous revenge of her [Susan] having at last something to show" (146). Interestingly, many critics follow Susan's example and admit Milly into evidence by putting her life "into the scales" so as to judge other characters, particularly Kate, as well as James' version of poetic justice.

The last section of the novel, however, suggests that rendering poetic justice is not as simple as Susan would have it. After Milly dies, Merton again suggests to Kate that "it is as I am that you must have me" (472). He offers to marry Kate without Milly's money so as to "right everything that's wrong. . . .We've only to announce it—and it takes off the weight" (472). Here, Merton could well refer to the scales upon which it was earlier suggested that Milly's life could be measured, and for Merton, righting the wrong means that he and Kate should return to the terms of their association before they became involved with Milly. Yet, as Kate's response suggests, merely removing the weight does not necessarily provide the means to return to the previous arrangement. At first, Kate wonders "what has changed," as they have "been going on together so well," that would make him "desert" her (472). When Merton asks how she can call it "well," Kate replies, "I call it perfect—from my original point of view. I'm just where I was" (472). Here, Kate and Merton clearly invoke different versions of their original understanding, and given the numerous renegotiations of the terms of their association, it is not surprising that they cannot agree on the terms of a specific, discrete exchange. Kate pushes her point

further by suggesting that they modify their agreement again: "if you really know something[,] . . .if you can tell me what you know" then she will "consent" to his terms (473). However, when Merton admits that he does not know anything, she reiterates her point; she will consent only "for an idea. . .given. . .in good faith" (473). When Merton fails to provide such an idea, they eventually reach the impasse dramatized in the concluding lines of the novel. Her declaration—"we can never again be as we were"—seems particularly significant given her claim in the opening chapter that "the broken sentence, if she was the last word, would end with a sort of meaning" (57). Situated within the context of this web of relationships, Kate's claim suggests that a just resolution, both to their fictional dilemma and to James' plot, cannot be guaranteed by the content of the promise itself. Restitution, either as a balance achieved on Milly's scales or as the more dramatic "poetic justice" of Susan Stringham cannot provide an adequate model of justice. Instead, James' promise of an equal exchange turns out to be but his offer of a "thin guarantee" that does not adjudicate among the relations it invokes but rather provides, to use Densher's phrase, only a "workable law" (368), the assurance offered by a "flash of justesse" (397).

Such flashes of "justesse" also preoccupy James' friend and contemporary, Edith Wharton. In the next chapter, I will turn to her work to explore further the complicated relationship between contract theory and justice. Like the other authors under consideration here, Wharton utilizes legal discourse to mark the intersection of market-oriented claims and ethical claims. Indeed, Wharton's work demonstrates the ways in which such discourse negotiates between the ethical claims of individuals and groups and the systems, particularly the economic marketplace and the law generally, that both

enable and constrain those claims. More specifically, Wharton, like James, suggests that contracts invoke multiple relations rather than discrete exchanges, and, as a result, the rights-based model of justice associated with classical contract theory often diminishes those whose claims cannot be articulated or recognized in terms of specific rights.

CHAPTER FIVE

Freedom of Contract, Rights Claims, and Justice in Selected Works by Edith Wharton

"Superficially their vocabularies were the same; below the surface each lost its meaning for the other."

Edith Wharton, *The Children*

In 1905, Edith Wharton published her first major critical and financial success, the novel *The House of Mirth*, while the United States Supreme Court deliberated what would become one of its most controversial decisions, the ruling in Lochner v. New York. Wharton's *The House of Mirth* chronicles the experiences of Lily Bart, an unmarried woman who lacks family wealth and a stable social position, as she negotiates the complex web of social relationships among high society's wealthiest members. After Lily compromises her chance to capture a very rich man, primarily because of her attraction to Lawrence Selden, Lily comes into possession of a packet of letters that provides evidence that Bertha Trenor, a married woman who seems intent on ruining Lily's chances for security, has had an affair with Selden. The letters could provide both financial stability and a secure social position if Lily would choose to use them to blackmail Bertha. At the very least, Lily could use the letters to silence Bertha. However, Lily refuses to participate in such an exchange, a decision that contributes to her downfall, both socially and financially. Shunned by members of her own class, Lily finally ends up as a seamstress in a hat-making shop but soon loses even that position because she is ill-prepared to work for a living. Eventually, Lily dies after a chloral overdose, leaving Selden to piece together a narrative of her life, a narrative predicated

upon sketchy bits of evidence elucidating the series of exchanges that come to define her life.

At first glance, Lochner v. New York does not seem to have much in common with Wharton's novel. In Lochner, the Supreme Court, by a 5-4 margin, struck down a New York state law providing that bakery employees could not work more than sixty hours per week. Justice Peckham, writing for the majority, argued that the New York law "necessarily interferes with the right of contract between the employer and employees" (374). Indeed, the "right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution" (374).[1] For the majority, then, the case could be reduced to a conflict between two basic rights: "It is a question of which two powers or rights shall prevail,--the power of the state to legislate or the right of the individual to liberty of person and freedom of contract" (375). The majority did not find sufficient justification for the exercise of state police power to regulate bakery employees: "there is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state" (375). Accordingly, the Court held that "under such circumstances the freedom of master and employee to contract with each other in relation to their employment. . .cannot be prohibited or interfered with, without violating the Federal Constitution" (376). Thus, the individual right to contract trumps the state's right to exercise its police power. Justice Oliver Wendell Holmes, Jr., however, did not agree

[1] The Due Process Clause of the 14th Amendment, at issue in Lochner, provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

with the majority opinion. In his famous dissent, he acerbically pointed out that "the 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics" (377). Citing "Sunday laws and usury laws" as "ancient examples," Holmes argued that "state laws may regulate life in many ways which are as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with freedom of contract" (377). Similarly, in a separate dissent, Justice Harlan, with whom Justices White and Day concurred, suggested that "it may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not on equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength" (376). In each instance, the dissenters implied that the majority overlooked the actual position of the bakers in relation to their employers.

Both the Lochner case and *The House of Mirth* address the right to make contracts as well as the justice of those contracts. Indeed, the Lochner case, like many of Wharton's novels, foregrounds the central tensions of social contract theory and contract law that I have explored throughout this project and provides a compelling example of the tendency to reduce complicated social issues to a conflict between different rights. In essence, the Lochner decision venerates the individual's ability to enter the contracts of his or her choosing without interference from the state and without consideration of the justice of those exchanges. Consequently, many legal theorists cite Lochner as the zenith of freedom of contract and laissez-faire economics. As Stephen M. Feldman explains:

> Lochner and related Supreme Court cases constitutionalized laissez-faire economics and the modern individualist ethos: supposedly to promote

> individual liberty or freedom of choice, the Court sought to protect the economic marketplace from undue governmental regulation or interference. (101)

The majority's reasoning invokes many of the central tenets of both social contract theory and classical contract theory—a belief in hypothetical freedom of contract, individual autonomy, and the inherent justice of contractual exchanges. In contrast, the dissenters point to the limitations of classical contract theory by suggesting that real-world, material conditions severely limit hypothetical freedom of contract and that contracts actually provide a stabilizing force that can frustrate rather than facilitate autonomy. For the dissenters, then, it is well within the State's role to enact legislation that takes into account matters such as the bargaining position of the parties and the fairness of contractual exchanges.

Like the Lochner case, Wharton's *House of Mirth* attempts to negotiate similar tensions, and in many ways, Lily Bart seems the perfect embodiment of liberty of person and freedom of contract because most of her relationships with others involve contractual exchanges that feed into Lily's optimism. With each exchange, Lily believes she will be able to improve her circumstances; however, these exchanges often challenge the vision of autonomy upon which they are predicated. Indeed, Lily's dire economic circumstances compel her to enter several agreements that ultimately work to her detriment. For instance, Lily serves as her aunt's companion based on the assumption that she will one day inherit her aunt's fortune in exchange for her companionship during her aunt's life. However, Lily finds herself virtually disinherited, left with only a small bequest rather than the entire fortune, when rumors of her relationships with married men, George

Dorset and Gus Trenor, reach her aunt. In one of her most notable exchanges, Lily allows Gus Trenor to invest money on her behalf. When he later gives her several thousand dollars, Lily erroneously believes that this windfall represents the fruit of her investment; however, Trenor later implies that the money constitutes payment for Lily's companionship and sexual favors. Lily uses her small inheritance to repay Trenor. In another problematic exchange, Lily agrees to travel with Bertha and George Dorset; the Dorsets will pay Lily's expenses, and, in return, Lily must distract George so that Bertha can carry on her affair with Ned Silverton. However, Bertha sets Lily up so as to suggest that Lily and George are actually having an affair, and this incident proves to be Lily's social undoing because she refuses to use Bertha's letters to Selden to silence Bertha.

In her famous Marxist reading, "Debasing Exchange: Edith Wharton's *House of Mirth*," Wai-Chee Dimock argues that Lily's refusal to use the letters amounts to "her most eloquent protest against the ethics of exchange," a protest that, in the final analysis "is ultimately futile, ultimately contained, absorbed, and exploited by the very system against which it is directed" (386). Citing the exchanges I mentioned above, as well as many more, Dimock persuasively suggests that "the power of the marketplace" in the novel "resides. . .in its ability to reproduce itself, in its ability to assimilate everything else into its domain" (375). Indeed, beneath the "shadow" of the marketplace, "even the most private affairs take on the essence of business transactions, for the realm of human relations is fully contained within an all-encompassing business ethic" (375). For Dimock, Lily's downfall occurs because she does not ultimately understand how the market works; indeed, Lily is the only character in the novel who actually pays her debts. Unlike the Bertha Dorsets of the novel, Lily cannot master the "doublethink" that

constitutes "the very essence of the exchange system" and "explains why a system based on exchange should have nonpayment as its secret motto" (378-79). Lily's decision to burn the letters then gestures toward a moral transcendence that the market cannot recognize; as Dimock puts it, "the nobility of her action surely lies in its fruitlessness, in its utter lack of material consequences, in its erasure from history" (387).

Indeed, the only solace Lily finds, once she has fallen completely out of her social class, comes via a chance encounter with another working-woman, Nettie Struther. Dimock reads this encounter as Wharton's half-hearted gesture at some version of transcendence that turns out to be a romanticized vision of the working class; thus, Nettie's desire to see her daughter "grow up to be just like Lily" undermines the potential of this vision (389). Dimock overlooks another problem that reveals itself in Nettie's view of justice; for Nettie, justice redresses individual rather than social concerns. When Lily tells Nettie about her problems, Nettie refuses to believe that someone like Lily could be unhappy:

> *You* in trouble? I've always thought of you as being so high up, where everything was just grand. Sometimes, when I felt real mean, and got to wondering why things were so queerly fixed in the world, I used to remember that *you* were having a lovely time, anyhow, and that seemed to show there was a kind of justice somewhere. (330, emphasis in original)

Thus, Nettie's version of justice justifies her own social position through a perverse balancing act that relates her position to Lily's without accounting for the ways in which, to use Dimock's phrase, "the power of the marketplace" defines both their roles. Nettie implicitly justifies her own circumstances through an appeal to Lily's supposed freedom.

Nettie suggests a version of justice that seems remarkably, if somewhat surprisingly, similar to Lawrence Selden's account of a "republic of the spirit" which promises absolute freedom (71). Early in the novel, Selden, echoing the Lochner court, describes "success" as "personal freedom" (70). More specifically, this freedom represents freedom "from everything—from money, from poverty, from ease and anxiety, from all the material accidents. To keep a kind of republic of the spirit—" (71). When Lily asks how to find this republic, Selden explains that "it's a country one has to find the way to one's self. . . .There are signposts—but one has to know how to read them" (71). After some reflection, Lily points out that his republic may be "unjust" because "one of the conditions of citizenship is not to think too much about money, and the only way not to think too much about money is to have a great deal of it" (72). Indeed, Lily recognizes that, rather than a republic, Selden is proposing "a closed corporation" and that he "create[s] arbitrary objections in order to keep people out" (74). Selden then posits absolute freedom in what amounts to a republic of one. Indeed, as Mary Papke explains, this republic constitutes "a social void" (121). Both Selden and Nettie then replicate the logic of the Lochner case by envisioning individual freedom as absolute and justice itself as the primary justification for that freedom.

Thus, neither Selden nor Nettie offers adequate answers to the questions Lily herself raises about justice. As I mentioned earlier, Lily refuses to use Bertha's letters to Selden to save her own social position and instead impulsively decides to burn them. In the process, Lily rejects the wealthy Simon Rosedale's offer of marriage on the condition that she will use the letters to regain her social position so as to facilitate his own climb up the social ladder. For Lily, Rosedale's offer "reduced the transaction to a private

understanding" that "simplified life to view it as a perpetual adjustment. . .in which every concession had its recognized equivalent," and her "mind was fascinated by this escape from fluctuating ethical estimates into a region of concrete weights and measures" (271). Here, a specific measure of justice tantalizes Lily with its apparent clarity. When she reflects on her decision to reject his offer, Lily wonders about the justice of her situation and, indirectly, her fate:

> In fending off the offer he was so plainly ready to renew, had she not sacrificed to one of those abstract notions of honour that might be called the conventionalities of moral life? What debt did she owe to a social order which had condemned and banished her without a trial? She had never been heard in her own defence; she was innocent of the charge on which she had been found guilty; and the irregularity of her conviction might seem to justify the use of methods as irregular in recovering her lost rights. (316)

Wharton's use of legal discourse to describe Lily's situation implicitly questions both justice in the abstract as well as particular justifications for decisions. Indeed, Lily contemplates blackmail as a means to recover her rights and suggests that a different name for the transaction might make it less odious: "Call it blackmail and it becomes unthinkable; but explain that it injures no one, and that the rights regained by it were unjustly forfeited, and he must be a formalist indeed who can find no plea in its defence" (316). However, Lily can find no solace in such empty distinctions. Indeed, when Lily wonders about her "debt" to the "social order," her question implicitly recognizes the need for a solution from a social order so constructed as to be unable to provide that

solution, and this bleak vision persists throughout most of Wharton's works. Given Wharton's use of legal discourse throughout the novel, law clearly plays an important role both in providing possible solutions and in constructing the problem in the first place.

Other critics also note Wharton's attention to legal issues. As William E. Moddelmogg recently pointed out about *The House of Mirth*, "the law serves as one of the discourses structuring Wharton's narrative" (340). [2] Moddelmogg focuses specifically on the ways in which contemporary debates about the right of privacy inform our understanding of the novel; however, Wharton's use of legal discourse extends far beyond that of the privacy debate. Indeed, as my brief reading of *The House of Mirth* suggests, Wharton often employs legal discourse, particularly the language of contractual obligation and rights, to depict relationships among characters and to examine the ways in which characters define themselves. In order to understand how, to use Moddelmogg's terms, legal discourse structures Wharton's novels, it is important to situate that discourse

---

[2] For Moddelmogg, the right of privacy, rather than contract theory specifically, provides the focal point as he draws on Brook Thomas' account of privacy in James' *The Bostonians* to argue that legal language in *The House of Mirth* "closely resemble[s]" that of contemporary "legal debates over privacy" (340). Moddelmogg suggests that arguments, such as "The Right to Privacy" by Warren and Brandeis, in favor of the right to privacy were really concerned "with the viability of the law's possessive, rights-bearing subject" (338). According to Moddelmogg,

> The language of rights derives its authority from the liberal conception of selfhood—a conception whose emphasis on self-ownership and autonomy comes dangerously close to affirming a kind of radical subjectivism, yet whose rationalist assumptions presuppose the universal nature of truth and knowledge. (338)

Since Lily Bart's "consciousness both reflects and struggles against dominant discourses of privacy and subjectivity" (339), Wharton "testifies to a form of female subjectivity that domestic and legal discourse denied" (340). Indeed, *The House of Mirth* "delves into the mechanisms that prevent alternative constructions of subjectivity from being recognized and articulated" (353). Thus, "Lily's refusal to 'explain her case' reflects the extent to which her situation constitutes a legal problem without a legal solution" (353), and her death, then, "testifies to the limits of both legal and literary epistemology, imaging a subject that, in its very boundlessness, can never be reduced to an object of knowledge" (356). While Moddelmogg provides a compelling account of the connection between the right to privacy and

within its historical and philosophical contexts by considering the role of social contract theory in producing particular accounts of rights and justice and examining the tensions within that theory that both Lochner v. New York and *The House of Mirth* reveal.

In twenty-first century terms, claiming a right does not mean very much, particularly in the United States, because we tend to claim rights to anything and everything and often without understanding what we claim and upon what grounds that claim can be justified. Indeed, in many situations, rights seem self-justifying and operate as what Ronald Dworkin calls "trump cards" which signal the end, rather than the beginning, of meaningful discussion. As Mary Ann Glendon points out, "discourse about rights has become the principal language that we use in public settings to discuss weighty questions of right and wrong, but time and again it proves inadequate, or leads to a standoff of one right against another" (x).

In *Residues of Justice,* Wai-Chee Dimock states the case against rights discourse even more forcefully than Glendon. Like Glendon, Dimock questions the dominance of a rights-based model of justice and suggests that "what flows from the language of rights is an absolute principle of justice, one that extends to all areas of life, and one that knows neither compromises nor concessions" (183). In her discussion of Kate Chopin's *The Awakening*, Dimock notes that Edna Pontellier often phrases rights in the negative so that "the right holder turns out to be a non subject, a nonentity, a 'nobody (who) has any right'" (193). Dimock says that this construction of rights is typical of an "adversarial grammar" that "in assuming a constitutive opposition between persons, must assume as

---

subjectivity, his analysis leaves unstated the relationships among rights discourse, justice, and contract theory.

well a constitutive opposition between two kinds of rights: rights possessed by oneself and rights possessed by others" (193). An important element of this "possession" is ownership imagined "not only as something owned but as something owned to the exclusion of others" (196). In *The Awakening*, Edna becomes merely a "holder of rights rather than a claimant" in an effort to create a world in which "the moral agent can indeed live. . .without abuse to others, without infringing on their rights, without violating the contours of their being" (201-2). The novel seems "to embody the language of rights up to the last," and consequently "must remain a discourse of subjectivism even as it chronicles the demise of its moral subject" (221). Dimock argues that some subjects always remain unaccommodated within the language of rights because "its map of shadow and substance will give credence only to one set of feeling, one set of claims, one image of Reason," and, as a result, an "alternative language" is necessary to address "what is not resolved by these concepts" (223).

Though Wharton's novels draw attention to what remains unresolved by traditional appeals to a rights-based model of justice, she does not suggest that the limits of that model always demand an alternative language. In the following discussion, I will build on my brief reading of *The House of Mirth* by looking at two novels, *The Reef* and *Summer,* from Wharton's major phase; *The Reef* in particular has been neglected by critics in favor of Wharton's most well-known works such as the Pulitzer Prize winner *The Age of Innocence.* In *The Reef,* Wharton critiques the tendency to view rights discourse as absolute without completely rejecting rights discourse as a way to describe and to argue for specific needs. *Summer* takes up a similar issue as Wharton explores the tension between individual right holders and the communities within which they must

claim those rights. Unlike theorists such as Glendon who believe that rights discourse can be revitalized by resituating it within the context of communities that nurture civic virtue, Wharton finds no such hope in communities such as the mountain and North Dormer of *Summer* or the transient, mobile communities of *The Children.* Indeed, Wharton's critique of rights discourse in *Summer* depends on an equally devastating critique of these communities. This chapter, and this project, will conclude with a brief reading of *The Children,* a novel published in 1928 near the end of Wharton's career and neglected by critics. *The Children* foregrounds the complicated convergence of legal and ethical issues that has been explored throughout this project.

Rights and Justice in Edith Wharton's *The Reef*

The diplomat George Darrow provides an accurate summation of many of *The Reef*'s convoluted relationships when he states that "a good deal depends on the words one uses to define rather indefinite things" (165). Significantly, many of the "indefinite things" explored in *The Reef* and the "words" used by Edith Wharton to describe them refer to the law. Recent criticism of *The Reef* generally overlooks this tendency in an effort to determine whether Anna Leath or Sophy Viner is the novel's heroine or to connect the characters and events to Edith Wharton's life, particularly her affair with Morton Fullerton.[3] For instance, James W. Tuttleton sees the novel's theme as "the

[3] For James Tuttleton, Anna Leath is a "partial portrait" of Wharton (465). However, Tuttleton does imply that Anna, by "holding out" for "the fullness of love," "may mock the fate that mocks desire" (472). For James Gargano, Anna's "ultimate renunciation [grows] from a vision of the individual life as vital service in behalf of the moral structure of society" (40). Accordingly, Anna's "repudiation of both Sophy and Darrow is based on her. . .assurance. . .that every breach of trust undermines the fragile and constantly imperiled socio-moral structure" (48). In contrast, Rebecca Blevins Faery reads Sophy as a positive sign of female sexuality that "interrupts/disrupts the text of the patriarchal love story of Darrow and Anna Leath" (86).

tortured frustrations of inhibited love," a theme he connects to Wharton's much-discussed affair with Fullerton, and Gloria C. Erlich also argues that *The Reef* is Wharton's replaying of that affair and its implications. However, neither Tuttleton nor Erlich notes Wharton's use of legal discourse in her correspondence with Fullerton, particularly after it seemed obvious that the affair had ended.

In a letter to Fullerton dated May, 1909, Wharton acknowledged that the affair was likely over and proposed a renegotiation of the terms of their relationship: "the situation is changed, & I, who like to walk up to things, recognize it, & am ready to accept it—only it must be nettement [clearly]!" (*Letters* 179). Wharton continued, again employing the contractual language of conditions and exchanges, "I recognize, also, perfect freedom in loving and in un-loving; but only on condition that it is associated with equal sincerity. . . .I look on you as free to carry your soucis cardiaques [affairs of the heart] where you please; but on condition that you & I become again. . .the good comrades we were two years ago" (*Letters* 180). For Wharton, changing the terms of the relationship would prevent resentment on both sides. She reiterated this point in a letter written sometime late in the summer of 1909 and again characterized their relationship as an exchange: "I know how unequal the exchange is between us, how little I have to give that a man like you can care for, & how ready I am, when the transition comes, to be

---

William R. MacNaughton calls attention to Sophy as a heroine who attempts "to create a free self within stifling, almost naturalistic bounds; and who improvises roles in response not only to the demands of specific situations but also her own deepest needs" (215). In "Fairy Tale Love and *The Reef*," Elizabeth Ammons argues that both Sophy and Anna are disillusioned by fairy-tale dreams of rescue and security; Ammons states that "*The Reef* exposes deluded female fantasies about love and marriage: false romantic visions generated and perpetuated by limitations imposed on women--in Sophy's case, economic dependence; in Anna's sexual repression" (616). Sherrie A. Inness, in turn, argues that the novel critiques the socially constructed binary of Nature/Culture. Darrow "associates Sophy with Nature and Anna with Culture" and "uses this polarity to justify seducing Sophy and striving to marry Anna" (77).

again the good comrade you once found me" (*Letters* 189). By winter, the relationship clearly had changed as Wharton pointed out that though she has offered friendship, Fullerton merely avoided her and sometimes did not answer her letters. In a letter written in the winter of 1910, Wharton complained that he had lied to her to avoid seeing her. Apparently, Fullerton told her that he was sick, and when she went to his hotel to check on him, he was not there. As she wrote the letter, she constructed a dialogue in which each of them asserted his or her rights:

> I hear you say: "What! I haven't the right to be absent from my hotel at 9 in the morning, or any other hour?" –You have every right, Dear, over every moment of your time & every feeling.—Only don't tell me the night before: "I am too ill to see you." Don't you understand that what hurts me is not the fact of the change, which I find myself able to accept with a kind of cheerful stoicism that reassures me? –It's not that, Dear, but the pain, the unutterable pain of thinking you incapable of understanding my frankness & my honest desire to let you lead your own life. –You say: "I will be all you have the right to expect." –If I have any rights, I renounce them. (*Letters* 196-97)

With this renunciation, Wharton hoped that they could remain friends if nothing else, though she pointed out that Fullerton's behavior had complicated any such transition. She continued, "the one thing I can't bear is the thought that I represent to you *the woman who has to be lied to*. . .And if I think this, it is your own conduct that has brought it about" (*Letters* 197, emphasis and ellipsis in original). Wharton closed the letter on a fatalistic note: "Don't answer. It's useless.—I am your camarade—" (*Letters* 197).

Wharton's renunciation of her rights is a move that her fictional characters often duplicate, particularly in *The Reef.* Indeed, renouncing one's rights seems the only act of agency available when it becomes clear that competing rights will lead to a standoff in which justice cannot be served.

Wharton finished the *The Reef* in August of 1912 (Lewis 325), and the novel, also published in 1912, appeared during a time of intense theoretical debate among American legal scholars. In many ways, *The Reef* is a novel about justice, about both truth-seeking and truth-telling, and, as a result, it is not totally surprising that Wharton often uses legalistic language to describe the reasons that characters provide as both motivations for and justifications of their actions. Indeed, in this respect, *The Reef* intersects with the language of rights that informed key legal debates of the time.[4]

For instance, just one year after the publication of *The Reef,* Wesley Newcomb Hohfield explained the nature and meaning of legal rights and liberties in his seminal 1913 essay entitled "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." At the heart of the essay is the age-old debate about whether jurisprudence should be based on a system emphasizing rights or on a system emphasizing duties, a debate which also informs our understanding of *The Reef.* Legal scholars place Hohfield's argument within analytical jurisprudence, a field that attempts to identify

[4] For many legal scholars, the 1890 publication of the landmark essay "The Right to Privacy" by Samuel D. Warren and Louis D. Brandeis marks the beginning of a new emphasis on rights as a means to delineate the terms of social relationships.

clearly and to define specifically the concepts, primarily rights and liberties, which constitute the basis of actual legal reasoning.[5]

According to Joseph William Singer, "the history of analytical definitions of rights and liberties is best understood as the construction of a theory whose purpose was to mediate the fundamental contradiction between freedom of action and security" (984). Early proponents of analytical jurisprudence developed what Singer calls a "meta-theory" that was "based on the distinction between self-regarding and other-regarding acts" (984). According to Singer, theorists such as Bentham, Mill, and Austin argued that liberties, granted by the sovereign, amounted to the freedom of a legal subject to do anything that did not harm another legal subject (984). Singer argues that this theory enabled the creation of laws that "would allow individuals great freedom to act in a self-interested manner without exposing them to harm inflicted by others" (984). At the same time, "since liberties involved merely self-regarding acts, the legal system "imposed duties on others not to interfere with the permitted acts" (984). This system obscured "the extent to which the legal system allowed people to harm each other. . .[and] the extent to which the legal system allowed people to interfere with the permitted acts of others" (985). These theories masked the existence of harms, which legal scholars refer to as *damunum absque injuria*, that do not result in legally redressable injuries.

---

[5]The extent to which Hohfield critiques his classical predecessors is open to debate. In *The Transformation of American Law,* Horwitz merely places him "in a line of analytical jurisprudence" beginning with Bentham and Austin in England (153) while Singer emphasizes Hohfield's attempt to clarify the problematic definitional ambiguities present in the work of earlier scholars. I have chosen to rely heavily on Singer's article because it attempts a more specific analysis focusing solely on the rights debate itself, rather than Horwitz's broader study in which Horwitz generalizes Hohfield's position within all of American law between 1870 and 1960.

According to Singer, Hohfield's article represents the culmination of a more modern approach that recognized that "to the extent others have legal liberty, one has no security" (985). The tension between the competing desires for both liberty and security permeates the convoluted relationships between Sophy, Owen, Anna, and Darrow. While Hohfield's discussion of rights raises theoretical issues—debated extensively among legal scholars—that are beyond the scope of this project, a basic understanding of a portion of his argument provides an important backdrop against which Wharton's *The Reef* can be read with new appreciation. Hohfield's discussion directs our attention especially to the importance of viewing rights, duties, and privileges in relation to each other.

Acknowledging that the word "right" is often used to mean privilege, power, or immunity indiscriminately, much of Hohfield's article addresses the need to keep rights and privileges distinct in legal discourse because a person does not necessarily have both a right and a privilege in regard to the same action. At the center of Hohfield's argument is his famous chart outlining what he refers to as "jural relations" (30):

Jural Opposites

rights	privilege	power	immunity
no-rights	duty	disability	liability

Jural Correlatives

right	privilege	power	immunity
duty	no-right	liability	disability[6]

[6] For the sake of clarity, this chart actually follows Morton J. Horwitz's formatting (152). Hohfield's original version appeared with the headings "Jural Opposites" and "Jural Correlatives" at the far-left margin which made the headings appear, at first glance, to refer to another set of jural relations (30).

The categories of "jural opposites" explain the relationship of a single individual to a specific action; for instance, that individual has either the right to act in a certain way or no-right to act in a certain way. Similarly, an individual may have the privilege that enables him or her to act or the duty that prevents him or her from acting. The categories of "jural correlatives" explain the relationships of two individuals to the same situation or action. Hohfield quotes the reasoning of the court in Lake Shore & M. S. R. Co v. Kurtz to explain that "a duty or legal obligation is that which one ought or ought not do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated" (32). According to Hohfield, a synonym for right is claim, a term which implies that rights can be enforced by the state. Hohfield further explains this distinction with an example: "If X has a right against Y that he [Y] shall stay off the former's [X's] land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place" (32). If Y enters X's land, X has a legally actionable claim against Y. As Singer explains, "any time the state confers an advantage on some citizen, it necessarily simultaneously creates a vulnerability on the part of others" (897). In the same example, X also has a privilege to enter the land that is distinct from his or her legal right to do so. According to Hohfield, "the correlative of X's privilege of entering himself is manifestly Y's no-right that X shall not enter" (33). This relationship does not, however, imply a duty for Y not to enter. By contextualizing and formalizing the relationship among rights, no-rights, duties, privileges, and other elements, Hohfield attempts to stabilize the relationships he describes.

Wharton's *The Reef*, in turn, demonstrates the tenuousness of such an attempt at stabilization. While Wharton certainly deploys the various judicial correlatives and

judicial opposites that Hohfield delineates, she undermines the categories even as she invokes them. Indeed, her characters often justify their choices through appeals to rights, duties, and privileges that seem to provide inherent justifications for their decisions. At the same time, however, Wharton, like Hohfield, would have us untangle these claims and clarify the relations among them. Yet, such clarification is difficult, at best, because Wharton organizes the novel around a series of shifting triangles which complicate attempts to describe the relationship between two people without also including a third party.

The novel opens with Anna Leath's cryptic telegram to her childhood sweetheart, George Darrow: "Unexpected obstacle. Please don't come till thirtieth. Anna" (17). We later learn that the motivation for the telegram is Anna's sense of duty to her daughter, Effie, because Anna initially delays her reunion with Darrow when she cannot secure a governess for Effie. Thus, the terms of their relationship must immediately be redefined in a way to account for Anna's daughter. The telegram comes after Darrow and Anna have rekindled their relationship, after twelve years apart, when they accidentally meet several times at parties. These initial meetings occur before the novel opens so that the reader has only Darrow's version of the events surrounding their reunion. Darrow, a man who sees himself as a "personable young man, with all the privileges pertaining to the state" (30), views Anna's attention after their long separation as granting him a privilege; when he left her after their most recent reunion, he did so "with the sense that he was a being singled out and privileged, to whom she had entrusted something precious to keep" (20). For Darrow, this exchange amounts to a gift "left to him to do with as he willed" (20). Though he does not explain what the "something precious" actually is, his language

makes it clear that he believes Anna has given something up so that his "privilege" is derived from her corresponding loss. Darrow's reaction to her delay of their plans to meet at Givrė, the ancestral home of Anna's deceased first husband, Arthur Leath, suggests the extent of the privilege he believes that she has granted him.

Darrow repeats her message, or some part of it, to himself several times over the course of the opening chapter. At one point, he attributes her decision to "the sex's traditional right to change" (24).[7] This sarcastic invocation of the language of rights in order to present a feminine stereotype is curiously at odds with Darrow's earlier emphasis on Anna's reasonableness. Indeed, when he initially receives her message, he is troubled that she can deal "so reasonably with their case" (18), even though his description of her figures Anna as a reasonable person, guided by her "sweet reasonableness" and her "good reasons" (17), who possesses the capabilities to uphold what he perceives as a kind of duty to him, perhaps a duty not to change her mind. Similarly, Darrow is also annoyed because Anna sends the telegram to his business address rather than his personal lodgings, and this "proof of her indifference" becomes "the main point of his grievance against her and his derision against himself" (24).[8] That Darrow can assert a "grievance"

For Darrow, actions must be justified, and the absence of such a justification itself constitutes proof; he reads Anna's silence as proof of the nature of her relationship with her first husband: "Mrs. Leath's words gave no hint of her husband's having failed to justify her choice; but her very reticence betrayed her" (20).

[8] Interestingly, in the same paragraph in which Darrow alleges his grievance, the language abruptly shifts into an adversarial, and here also sexual, vocabulary. In response to the "prod" of an umbrella, Darrow characterizes his surrounding space as "a battle-ground of thrusting, slanting, parrying domes" while the wind provides "a double assault" (24). The crowd becomes a kind of jury of his peers in a strange scene of adversarial justice: "it was as though all the people around him had taken his measure and known his plight; as though they were contemptuously bumping and shoving him like the inconsiderable thing he had become" (24). Anna experiences a similar moment of judgment in the novel's closing scene in which Anna visits Sophy Viner's sister in an effort to learn Sophy's whereabouts. When a strange man stares at Anna, "she had the sense of being minutely catalogued and valued[,]. . .of having been accepted as a better guarantee than he had any reason to hope for" (330).

against Anna reveals his own willingness to view their relationship in absolute terms of rights and duties.

Darrow's logic illustrates the very problem that Hohfield's essay addresses; Darrow believes that the privilege Anna has granted him creates a corresponding duty in her. Though it is not entirely clear what that duty may be, at least a part of it may include Anna's relinquishment of the "right to change her mind," a right which is essential to her own agency. Later, as he hopes for a letter from Anna, he imagines that "its contents might annul the writer's telegraphed injunction, and call him to her side at once" (55). It is significant that Darrow does not merely want Anna to change her mind again and then to summon him to Givré; instead, he wants an annulment, a legal instrument designed to nullify whatever agreement preceded it, which would completely negate her act of agency. *Black's Law Dictionary* defines "annul" generally as "to reduce to nothing," a definition that suggests Darrow's desire "to reduce" Anna's act of agency to "nothing."[9] In legal terms, her telegram would no longer exist, and the annulment would erase the evidence that Anna did, in fact, change her mind. Darrow's language is also interesting because it elevates private letters to documents of legal significance and thus affords them tremendous evidentiary weight.

Darrow uses what he perceives as Anna's breach of duty to justify the affair he falls into with Sophy Viner, a young woman he meets shortly after receiving Anna's telegram and before he goes to Givré. Thus, another triangle concerns Anna, Sophy, and

---

[9] The full definition is even more telling: "to reduce to nothing; annihilate; obliterate; to make void or of no effect; to nullify; to abolish; to do away with. To cancel; destroy; abrogate. To annul a judgment or judicial proceeding is to deprive it of all force and operation, either ab inito [from the first act] or prospectively as to future transactions."

Darrow. Sophy actually remembers Darrow from parties at the home of Mrs. Murrett, Darrow's acquaintance and Sophy's former employer. While Sophy represents no more than a pleasant diversion, Darrow creates for himself a sense of "obligation" to her "to postpone perforce the fruitless contemplation of his private grievance" (44). Part of Sophy's attractiveness to Darrow is what he perceives as her freedom; it "seemed" to him "that her experience had made her free without hardness" (39). As they take long walks around Paris, Darrow believes he gains insight into her personality: "What she liked best, he divined, was the mere fact of being free to walk abroad in the bright air" (48).[10]

However, Darrow's insights into Sophy's character are often suspect and are predicated in part on his own justification of his response to Anna's telegram. His romanticized sense of freedom is curiously at odds with Darrow's version of Sophy's life story, a story of an orphaned existence without economic or emotional security. According to Darrow, when her guardian died, Sophy did not receive her inheritance; however, for Sophy, the inheritance "had represented only the means of holding her in bondage" (36). Her sister's unconventional lifestyle is often held against Sophy; the "deplorable precedent of Laura's career" relieves Sophy's relatives of any further "obligation" to her (36).

In Darrow's presentation of Sophy's past, material property does not seem that important. However, Sophy's direct dialogue suggests otherwise. The economic difference between Sophy and Darrow is obvious from their first exchange in which

---

[10] These qualities stand in sharp contrast to Darrow's perception of Anna whom he sees destined to a life of boredom and repetition without the "gift" of his love. Darrow thinks that "a love like his might have given her [Anna] the divine gift of self-renewal; and now he saw her fated to wane into old age repeating the same gestures, echoing the same words she had always heard" (41).

Darrow plays the hero and searches for Sophy's lost trunk. When Darrow comments, "You've lost a trunk," Sophy immediately corrects him: "Not a trunk, but *my* trunk" (26 emphasis in the original). Unlike Darrow, Sophy is not so well-off as to afford a cavalier attitude toward her somewhat meager belongings.

Sophy also is the first character to utilize rights discourse as a way to claim a right to a particular thing, and she clearly connects rights with ownership and property and thus suggests one political implication of rights claims as a way to argue for the fair distribution of wealth. When Sophy and Darrow discuss Darrow's past relationship with Lady Ulrica, another member of Mrs. Murrett's circle, Sophy explains:

> Yes—I was envious of Lady Ulrica. . .because she had almost all the things I've always wanted: clothes and fun and motors, and admiration and yachting and Paris. . .And how do you suppose a girl can see that sort of thing about her day after day, and never wonder why some women, who don't seem to have any more right to it, have it all tumbled into their laps, while others are writing dinner invitations, and straightening out accounts, and copying visiting lists, and finishing golf-stockings, and matching ribbon, and seeing that the dogs get their sulphur? One looks in one's glass after all! (32).

Sophy's language suggests her belief that ownership should be based on some entitlement to the things owned, some sense of fundamental fairness, of justice, in the distribution of wealth. Darrow later views Sophy's poverty as an "injustice" that "he felt the desire to right" (60). By characterizing her situation as an "injustice," Darrow can justify his affair

as the means through which Sophy can improve her economic situation while he can ignore her real economic relationship to her circumstances (60).

The affair begins after Darrow, first by accident and then on purpose, fails to mail a letter written by Sophy to the family she is supposed to go to stay with so that Sophy will have to stay in Paris with him. When Darrow first legitimately forgets to mail the letter, he feels some guilt but is "absolved" by his belief that the letter would not have reached its destination that day even if he had sent it (59). As Darrow comes to see his own "case" (his situation with Anna Leath) as "irremediable" (64), he justifies spending more time with Sophy and so decides not to send the letter. To justify his own decision, Darrow even claims Sophy's decision not to send a telegram as evidence of her true desire to stay in Paris with him, and he does not feel any guilt until he realizes that she wrote a letter instead because she did not have "a penny to spare" for a telegram (71). Darrow only then wants to "confess the injustice he had done to her" (71).

In "The Ways in which the Heart Speaks," Elizabeth Lennox Keyser argues that "Wharton, by having Darrow think of his failure to mail the letter in such terms as 'expiation' and 'confession'--and, earlier, 'absolution' and 'contrition'--points up the seriousness of that failure, even as he struggles to make light of it" (97). However, I would argue that Wharton's legalistic terminology, while certainly reminding the reader that Darrow's action, or, more specifically, his non-action, is a serious one, functions simultaneously to evoke a sense of justice and judgement while accenting the fact that justice provides the mechanism for Darrow to eradicate the real meaning of his actions and to erase his responsibility by recasting his deception as a contract between "men." At

first, Darrow promises himself "he would not be fool enough to tell her that he had not sent the letter" because

> he knew that most wrongdoing works, on the whole, less mischief than its useless confession; and this was clearly a case where a passing folly might be turned, by avowal, into a serious offense. (72)

However, when Darrow finally confesses, he asserts that the act of confession is "proof" that he does not have nefarious designs on her (74). Eventually, Sophy does forgive him and explains that she nevertheless cannot stay, not because of anger at Darrow or of fear of damage to her reputation but because she has no money. Sophy states that "It's the money! With me that's always the root of the matter" (76). Darrow then offers Sophy a deal:

> Don't you think one friend may accept a small service from another without looking too far ahead or weighing too many chances? The question turns entirely on what you think of me. If you like me well enough to be willing to take a few days' holiday with me, just for the pleasure of the thing, and the pleasure you'll be giving me, let's shake hands on it. If you don't like me well enough we'll shake hands too; only I shall be sorry. (77)

Darrow's offer consciously evokes legalistic language and reasoning, and much like an actual legal case, a single point becomes the crux of the issue; in effect, he reduces their situation to a single fact that "the question turns entirely on" (77), and this version makes his earlier actions irrelevant. The legalistic language also enables him to transform their situation into a contractual one created by "talking as man to man"; by gaining her

consent, he can replace his earlier sense of responsibility and guilt with a contract formed between equals. Sophy sees only the promise of their agreement; she states that Darrow is "giving" her "the only chance" she has "ever had" (77). For Darrow, the agreement fixes the relationship in terms he can handle: "At the outset, he had felt no special sense of responsibility. He was satisfied he had struck the right note, and convinced of his power of sustaining it" (81). This supposedly simple sexual contract then becomes the basis of the explosive revelations at Givré.[11]

In the descriptions which open Book II, Wharton consistently presents Givré in terms of balance. The first description is of a "grassy court" from the entrance of which a "level drive" leads to a gate that opens on to "an equally level avenue of grass" (87). Givré, situated in "middle France" (88), sits upon this level ground, and a "double flight of steps" meets at its front door (87). Wharton repeats the word "court" several times in this opening description which suggests that Givré symbolically represents the seat of justice. Similarly, Faery proposes that Givré represents a "web of law and custom" (94). This reading is reinforced by Givré's name in an earlier manuscript version; In "Fairy Tale Love and *The Reef,*" Elizabeth Ammons reports that Wharton originally named Givré "Blincourt" which Ammons reads as "'blin[d]court'[ship], hence 'the reef'" (617). An equally plausible reading, especially in terms of Wharton's use of the word "court" and the descriptions emphasizing balance in the final version, is Blin[d]court, a name which evokes the adage that "Justice is Blind." While this expression generally indicates fairness, Wharton inverts it to suggest that blindness does not guarantee such fairness.

---

[11] That their agreement is primarily a sexual one becomes even more apparent when Darrow later recalls that "his caress had restored her to her natural place in the scheme of things" (245).

Like Givré, Anna Leath's first appearance in the novel is also described in terms of balance: "In the court, half-way between house and drive, a lady stood" (87). Anna's identity is also directly linked to that of Givré; when Anna first saw it as Fraser Leath's young bride, Givré "seemed. . .to hold out to her a fate as noble and dignified as its own mien" (88). Inness, in her reading of the binary pair Nature/Culture, views Anna in association with Culture, which represents, among other things, "the web of law" (77). The young Anna is partially attracted to Fraser Leath because his "scale of values is the same as hers" (95), and at first, "the sober symmetry of Givré had suggested only her husband's neatly balanced mind" (96). Years later, the house becomes "the place one came back to, the place where one had one's duties" until eventually Anna believes that "one could hardly, after so long a time, think one's self away from it without suffering a certain loss of identity" (89). Anticipating Darrow's arrival, Anna, "conscious of that equipoise of bliss which the fearful human heart scarcely dares acknowledge," attempts "to see the house through the eyes of an old friend. . .and in so doing she seemed to be opening her own eyes upon it after a long interval of blindness" (89). Her descriptions of both "blindness" and a "scale of values" in relation to herself suggest a version of Anna as justice figured as a blindfolded woman holding the scales.

Against the backdrop of Givré as a kind of court of justice, the language of rights becomes increasingly prominent. For Anna, the language of rights operates in several different ways. The young Anna Summers uses the terms right and privilege almost interchangeably. For example, when Anna feels excluded by the other young people at a party she attends, she has the sense of "being somehow laughingly but firmly debarred from a share of their privileges" (91). Similarly, when the young Anna sees Darrow

exchanging a look with another girl, she feels "a rage of possessorship" that inspires her to "assert her right to him at any price" (93). Anna believes that "none but she had a right to be so looked at" (93). Much like Sophy's assertion of her rights, Anna also predicates rights upon ownership. However, while Sophy's focus is clearly material possessions, Anna's claim is to property in Darrow's personhood, which, in turn, facilitates her own self-objectification based on Darrow's right to look at her.

The adult Anna, in contrast, views rights in concurrence with her obligations to her child, Effie, and her step-son, Owen Leath. As Anna contemplates marriage to Darrow, she questions "her right to introduce into her life any interests and duties which might rob Effie of a part of her time, or lessen the closeness of their daily intercourse" (298). The only right Anna ever actually asserts is Owen's right rather than a right of her own. When Sophy, now engaged to Owen, explains that she plans to leave Givré, she states that she is telling Anna first due to her obligations as Effie's governess. Anna responds thus: "Owen has a right to ask that you should consider him first before you think of his sister" (222). Later, Anna argues that Sophy had "no right" to let Owen love her (284).

Anna's willingness to put her children first raises interesting issues about the nature of rights among parents and children, and calls into question the true nature of her relationship with Owen. When the novel shifts to Givré, promising becomes increasingly important as a mechanism to create duties. Brook Thomas, while discussing the "association between contract and promising," suggests that promising provides a "contractual society with a moral foundation that results not from preconceived notions of status but from the duties and obligations that individuals impose on themselves in

their dealings with other members of society" (3). As promising becomes more prominent in the text, the absolute character of justice seems to be disrupted; however, because a promise is both freely entered into while at the same time structuring behavior, promising becomes another means of creating duties. The corresponding rights are figured negatively as no-rights because the promises are often one-sided and do not constitute exchanges unless sexual exchanges are involved. As an analysis of the series of promises between Anna and Darrow, Sophy and Darrow, and Anna and Owen suggests, Anna's relationship with Owen Leath becomes much more important than previous critical attention indicates. Darrow's promises are the only ones which approach actual exchanges; his promises to Sophy are based on their previous sexual relationship while his promises to Anna are based on the expectation, which is eventually fulfilled, of a future sexual relationship accompanied by the privileges afforded by the marriage contract. In contrast, Anna's promises are predicated on a sense of duty to Owen that seems completely divorced from any concept of exchange. This duty seems to go beyond the normal scope of a parent/child or even a brother/sister relationship, especially since Owen is not actually her child.

Before Darrow's eventual arrival at Givré, Anna has an important conversation with Owen, and in order to understand the duty Anna feels for Owen and the ways in which that duty influences her actions, a close evaluation of their relationship is helpful. In contrast to the symmetry of Givré and Fraser Leath, Owen has a "charmingly unbalanced face" and "a quaintly twisted reflection" of Fraser Leath's mind (100), and, according to Anna, Owen's "humours must have suggested to his progenitor the gambols of an infant Frankenstein" (100-01). During her marriage to Owen's father, Owen's

experiences became "the voice of her secret rebellions" (101). These descriptions place Owen in an antithetical position to the justice of Givre. Anna later explains their relationship to Darrow as based "on odd brother and sister terms" (116). The terms seem odd indeed when Anna further describes their relationship to Darrow as a strange connection now based on a parent/child bond: "Owen's like my son--if you'd seen him when I first came here you'd know why. We were like two prisoners who talk to each other by tapping on the wall" (235). This strange closeness and its potentially incestuous undertones are also implied in Anna's conversations with Owen. In one instance, while she watches from the court as Owen approaches, she recalls fancying that Owen's "response was warmer than that of her own child" (102). Owen "understands" things "in a tacit way that yet perpetually spoke to her" (102). Anna thinks that

> this sense of his understanding was the deepest element in their feeling for each other. There were so many things between them that were never spoken of, or even indirectly alluded to, yet that, even in their occasional discussions and differences, formed the unadduced arguments making for final agreement. (102)

Anna's reverie in this instance is interrupted when she thinks Owen will not continue coming toward her, and she breaks into an uncharacteristic run toward him, a run described in orgasmic language as "she seemed to be keeping pace with some inward rhythm, seeking to give bodily expression to the lyric rush of her thoughts" (103). When Owen sees her, she stops and waits until they can walk together, and their connection is further implied by the description that "they walked on with the same light gait, so nearly of a height that keeping step came as naturally to them as breathing" (104). Interestingly,

they are in the court when they finally pause to face each other, and when Owen asks if Darrow is coming, "a sudden heat suffused her" (104). Her blush again suggests that this is not the typical parent/child relationship.

During the course of their conversation, Anna and Owen make several promises to each other. Anna's mother-in-law, Madame de Chantelle, does not want Owen to marry Sophy, so Anna promises to "prepare" her for the news of their engagement if Owen will "promise not to rush things" (106). However, after they reach this agreement, Owen asks Anna what she is thinking about, even as he states "You and I don't have to say things to talk to each other" (108). When she tells him that he knows "as much" as she does, he reminds her that Darrow creates a difference between them; Owen then states that he does not "know Darrow as much as" she does (108). Later, Anna learns that Owen may have tried to undermine her trust, albeit unjustified, in Darrow. That is, when Owen tells Anna that he saw Darrow in Paris, he explains that Darrow was "in a hurry to get back to the lady" (116). Owen even tells Anna that the lady was "awfully pretty" before he finally admits that he did not see Darrow's companion's face (116).

When Darrow and Anna share their first extensive conversation alone at Givré, since the evening before "they had had between them Owen Leath and their own thoughts" (110), Darrow stands "framed in the doorway. . .a light-gray figure against the black and white flagging of the hall" (109). This description immediately sets Darrow apart from the black and white justice of Givré. At first, Anna confuses him with her first husband, Fraser Leath, who "used to march toward her through the double file of furniture," another image that suggests the balanced design of Givré, and who would pause "midway" to inspect himself in the mirror (110). Anna's memories of her first

husband further indicate Givré as a scene of balance normally associated with justice but also with self-regard.

When Darrow and Anna finally talk, their conversation takes place on the side of the house opposite the court. Abandoning the balanced scenes of Givré, they follow a path that "wound on circuitously through the woods" to a "crumbling pavilion with openings choked with ivy" (111).[12] During this romantic moment, Darrow reminds Anna of her telegram when he says, "There are to be no more obstacles now" (112). When it becomes clear that Anna does not know what he is referring to, Darrow clarifies: "Don't you remember the wording of the telegram that turned me back last May? 'Unforeseen obstacle': that was it" (112). The change from "unexpected" to "unforeseen" is a significant one because "unforeseen" implies the legal standard of foreseeability which refers to the ability of a reasonable person to anticipate future events and suggests that Darrow believes that Anna could have and should have foreseen the problem, later revealed as the need for a governess for Anna's daughter, Effie, from Anna's first marriage. Darrow's rewording again indicates his assumption that Anna owes him some sort of duty—here, to have foreseen this obstacle, a duty deriving from the privilege he believes that she granted him "to do with what he willed" (20).[13]

When Anna reveals that Owen may be getting married soon and explains that she has promised Owen that she will prepare his grandmother, Madame de Chantelle, for the

---

[12]Ironically, the ivy also suggests Sophy Viner's name so that one of the obstacles in their relationship is symbolically present even in this private moment.

[13]Anna may well sense that Darrow believes she owes him some sort of duty because it is during this conversation that she feels that "something in her. . .struggled to free itself" (113). Anna also notices Darrow's "seal-ring in a setting of twisted silver on the hand he had kept on hers" (115). This image of the

news, Darrow seems troubled by Anna's sense of obligation to Owen and states that when Owen is settled, Owen must recognize that Darrow has "the first claim" on Anna (120). However, as a close analysis of the language of rights suggests, the first claim apparently already belongs to Owen. Anna emphasizes the importance of both Effie and Owen to her when she says that she wants them to "feel free to make their own mistakes, and never, if possible, be persuaded to make other people's" (120). In spite of Darrow's uncertainty, Anna refuses to offer further explanations, again asserting her duty to Owen: "I've promised Owen not to tell anyone" (121). Anna's comments also reveal her fear that she will not have the right to her own happiness if she does not first fulfill her duty to Owen: "I couldn't bear it if the least fraction of my happiness seemed to be stolen from his--as if it were a little scrap of happiness that had to be pieced out with other people's!" (131). Curiously, Anna's subjectivity is linked, then, to her duty to Owen. Eventually, Darrow promises to help Anna secure Owen's future happiness; Darrow states that "together" they "can't fail to pull it off!" (131). [14]

At the end of this exchange, they share "a long kiss of communion" (127) that Darrow may see as at least a partial fulfillment of the girlhood "promises" "which her lips were afraid to keep" (41). This sexual promise awakens Darrow to the "high privilege of possessing her," and he likens her to "a picture so hung that it can be seen only at a certain angle: an angle known to no one but its possessor. The thought flattered his sense of possessorship. . ." (128). His sense of ownership is later echoed by Anna as

---

ring reappears throughout the text to remind Anna of the legal significance and consequences of marriage to Darrow.

[14]Later, Darrow has reason to regret this promise as he acknowledges that "he had certainly promised her his help--but before he knew what he was promising" (202).

she experiences feelings that are "richer, deeper, more enslaving" than "any she had known before" (292).

The approval of Madame de Chantelle, the representative of "the forces of order and tradition" (132), is essential for Owen's marriage to Sophy Viner. Darrow's first perception of her is that "she thought a great deal of 'measure,' and approved of most things only up to a certain extent" (132). Fortuitously, Darrow's ancestral link to the Everards provides "incontestable claims" for Darrow's own acceptance as Anna's husband:

> The fact that they offered such firm footing--formed, so to speak, a friendly territory on which opposing powers could meet and treat--helped him through the task of explaining and justifying himself as the successor of Fraser Leath. (134)

This characterization of "opposing powers" again echoes the sense of Givré as a court, here with Madame de Chantelle as judge. However, at least from Darrow's point-of-view, this court makes its decisions based on "claims" to an adequate heritage, and Darrow's claim is suddenly complicated by the arrival of Sophy Viner, who is now both Effie's governess and secretly engaged to Owen Leath.[15]

When Sophy and Darrow meet, and Darrow acknowledges having known her before, Anna asks Darrow to reveal whatever he knows about Sophy. Under this pretext, Darrow and Sophy share their first conversation alone at Givré, and Darrow opens the conversation with her promise to let him know about her situation occasionally (145).

---

[15]Madame de Chantelle later "summons" Darrow to her sitting room to elicit his help in preventing the marriage of Sophy and Owen (179-81).

Sophy soon reveals that she wants Darrow to help her stay at Givré (146), and, as Darrow sees it, "her first impulse was to defend her right to the place she had won, and to learn as quickly as possible if he meant to dispute it" (147). This places Darrow in the unusual situation of having to recognize his own duties. As he laments his plight, he realizes that "the situation, detestable at best, would have been relatively simple if protecting Sophy Viner had been the only duty involved in it" (148). Though Darrow believes his duty to Sophy is "paramount," he must still recognize his "contingent obligations" (148).[16]

Legalistic language becomes increasingly prominent in the conversations between Sophy and Darrow as the situation becomes increasingly more complex. During their next meeting, Darrow is aware that he lacks the necessary facts to make a "judgement" about her (164), and, somewhat at a loss, he appeals to her to "listen" to his "reasons" because "there's been time, on both sides, to think them over" (164). This language reinforces the adversarial nature of the situation as well as the absolutization of justice into two sides, one of which must win. Sophy assumes that he is renewing his "offer" to help her out of more than a sense of personal obligation to her; she implies that he offers his help because he believes he "owes" something to Anna Leath (165). Darrow, refusing to respond directly to her allegation, points out that, when it comes to reasons, "a good deal depends on the words one uses to define rather indefinite things," and he appeals to what he calls a "right" granted by their friendship to "intervene" in her "benefit" (165).

---

[16]Darrow reiterates this dilemma: "He had patched up as decent a conclusion as he could to an incident that should obviously have no sequel; but he had known all along that with the securing of Miss Viner's peace of mind only a part of his obligation was discharged, and that with that part of his obligation his remaining duty was in conflict. It had been his first business to convince the girl that their secret was safe with him; but it was far from easy to square this with the equally urgent obligation of safe-guarding Anna's responsibility toward her child" (161).

Like a good courtroom lawyer presenting her own "case" with "cold lucidity" (166), Sophy uses Darrow's own words against him and, after getting Darrow to admit his friendship with Anna, makes the logical leap that, just as his friendship with her affords him certain "rights," his friendship with Anna might create the justification, or even the "duty," for his advising Anna not to keep Sophy as Effie's governess (165-66). Sophy finally explains that she will not, in any case, be Effie's governess long because she has "had another offer" (167); however, Sophy does not explain that this offer is a marriage proposal from Owen.

When Sophy later learns that Darrow has spoken to Madame de Chantelle about Sophy's potential marriage, Sophy powerfully asserts the language of rights in her own defense and questions Darrow: "By what right, I should like to know? What have you to do with me, or anything in the world that concerns me?" (193). When Darrow explains that Madame de Chantelle is against the marriage, Sophy reminds him of his earlier promise "to say nothing" about their affair and accuses him of believing that she has no "right" to marry Owen (193-94). When Darrow claims that he does not want her to marry a man she does not love, Sophy argues "I am as happy as if I deserved it!" (195).

Owen and Anna also share an important conversation which further clarifies the increasingly complex web of promises. Owen immediately wants to know if Anna has informed Darrow of Owen's relationship with Sophy. Anna acknowledges that she has told Darrow only what their own marriage plans "obliged" her to reveal; she also tells Owen that he has her "word" (175). As this conversation suggests, the characters continue to assert promises as a means to reinforce the duties created in other characters.

The conflicting character of these promises is revealed, however, when Owen suggests that Darrow and Sophy have had an affair. At first, Anna is skeptical of Owen's "grievance" (229), and Darrow is able to convince Anna that Owen's accusations are the result of a misunderstanding, even though her own sixth sense suggests otherwise.[17] To support his own position, Darrow promises Anna as follows: "I'll do anything you want me to. . .but I don't yet know what that is" (235). In his defense, he calls up his original promise to Anna to help Owen as the basis for his questionable interactions with Sophy and further claims that this promise "pledges" him "to silence" (236) so that he cannot provide any explanation to Owen. However, Anna does not want him to speak with Owen; instead, she compels Darrow to speak with Sophy because she "owe[s]" (237) it to Owen to find out whatever she can about Sophy. Anna also wants Darrow to promise not to be too hard on Owen (248). Eventually, Darrow can no longer evade Anna's questions, and she finally accepts that Owen's allegations are true. Darrow then asserts his promise to Sophy to justify his silence; he argues that he was "bound" not to reveal that he had met Sophy in Paris (251).

Interestingly, as these promises take over the text, Wharton describes the court as having been damaged; indeed, Darrow "noticed that the gale of two days before had nearly stripped the tops of the lime trees in the court" (253). Anna's viewpoint suggests a similar mutilation of justice; she states that "it was as though he and she had been looking at two sides of the same thing, and the side she had seen had been all light and life, and his a place of graves. . ." (255, ellipses in original). Anna's shifting view of the complex

[17] Throughout the rest of the text, Darrow evokes legalistic language to assert his right to a fair hearing. For instance, Darrow complains that Anna will not "allow" him "a voice" (265) when she dismisses him "without a hearing" (266).

series of promises further suggests the intensity of her relationship with Owen. At first, she declares that "We're all bound together in this coil" (253). However, her duty to Owen soon reasserts itself as she contends that she "owed herself first to him--she was bound to protect him not only from all knowledge of the secret she had surprised but also--and chiefly!--from its consequences" (256). Later, Anna even thinks she "would give her life" to protect him from the truth about Darrow and Sophy (279).

After Sophy leaves Givré, Anna also faces the decision of whether or not to break her engagement to Darrow, and her decision to enter into a sexual relationship with Darrow again indicates the complexities of her relationship with Owen.[18] At one point, Anna acknowledges that "there were certain dishonors with which she had never dreamed that any pact could be made" because "she had had an incorruptible passion for good faith and fairness" (277). Later, she recalls Darrow's prediction that "when she had explored the intricacies and darknesses of her own heart her judgment of others would be less absolute" (293), and she realizes that "she and Darrow belonged to each other" (292).[19] At first, Anna denies the influence of her duty to Owen on her decision; she states that she had "never for a moment permitted herself the delusion that she had renewed her promise to Darrow in order to spare her step-son this last refinement of misery" (293). Only after Anna's relationship with Darrow is sexually consummated does she come to

---

[18]We are again reminded of the relevance of law and justice when Anna notices Darrow's seal ring for the second time and, in that moment, "the sense of the end of all things came to her" (312). This sense comes just moments before their relationship becomes a sexual one.

[19]Anna in part justifies her decision by universalizing Darrow's behavior as she imagines that her first husband might have had affairs as well: "she wanted to think that all men were like that because Darrow was like that: she wanted to justify her acceptance of the fact by persuading herself that only through such concessions could women like herself hope to keep what they would not give up" (295).

feel that they were "bound together as two trees with interwoven roots" (328). Before their relationship becomes a sexual one, Anna describes only her relationship with Owen in terms of being "bound" to another. Indeed, at one point, Anna believes that "to remember Owen was to cease to think of herself" (278), and this masochistic tendency toward self-erasure persists when her relationship with Darrow changes. However, their new relationship subsumes Anna's sense of duty to Effie and, by implication, to Owen as well. Anna states that "she was his [Darrow's] now, for life: there could never be any question of sacrificing herself to Effie's welfare, or to any abstract sense of duty" (315). Anna recognizes then that Darrow gains new rights when she acknowledges that the sexual contact confers "privileges" that "however deferentially and tenderly he claimed them. . .marked a difference and proclaimed a right" (324).

Some part of Anna still remains troubled, however, because she does not keep her word; that is, Anna reminds herself that "Sophy had kept her word, lived up to the line of conduct she had set herself; and Anna had failed in the same attempt" (315). Though Anna concedes to herself that "Darrow had been right in saying that their sacrifice would benefit no one," "she seemed dimly to discern that there were obligations not to be tested by that standard" (328). This need of some "standard" for evaluating obligations sends Anna once again in search of Sophy Viner.

In contrast to the balance of Givré, a different space entirely awaits Anna when she follows a "winding passage" to Sophy's sister's apartment which is characterized by its unbalanced décor, for example, a sofa in one corner and a grand piano in the other (330). As several critics point out, Anna also cannot identify who the present parties are,

and her experience has left her completely unprepared for such an environment.[20] Anna then enters Laura's very pink bedchamber, a color scheme upon which several critics have commented. Faery, for one, notes that "pink has been, throughout the novel, the sign of illicit sexuality" (95n4). However, the bedchamber is also strangely reminiscent of Madame de Chantelle's sitting-room which is described, in arguably more subtle terms, as decorated with "purple satin upholstery" and a "rose-wood fire screen" (178), and even Madame de Chantelle herself has a "slight pinkness of the eye-lids" (180) which reinforces some connection between the characters. However, while Madame de Chantelle's summons are always answered by the other characters, Laura calls for Jimmy Brance, another associate of Mrs. Murret's, and gets "no response" (334). Symbolically, Jimmy represents knowledge of Darrow's previous affair with Lady Ulrica, knowledge which contradicts Darrow's assurances to Anna that his affair with Sophy is not evidence of habitual behavior. In this perverse scene of justice turned upside down, then, summonses are ignored, and knowledge of the past is erased; all is stagecraft and empty gestures. In this world, a character like Sophy, who can openly proclaim "I chose it," has no place. Darrow's past must remain a gap to Anna, a gap that will never be filled, even if she does return to him as some critics imply. Anna can find no standards, absolute or otherwise, to guide her behavior so that she simply fades out with "an inaudible farewell" and a "murmured word of thanks" (334). The lack of a straightforward ending—of closure—implies that justice may never be served.

---

[20]MacNaughton refers to the final scene as an "unsettling epilogue" (222). Tuttleton, in contrast, argues that "Anna renounces the possibility of happiness as Darrow's wife" (467). However, I agree with MacNaughton's point that "critics who find definite proof here that Anna either will or will not return to George are simply deluding themselves" (222).

Prior Claims and Sovereign Rights: The Sexual Contract in *Summer*

Wharton continues her exploration of a rights-based model of justice in one of her most controversial novels, *Summer* (1917), in which Wharton describes the quasi-incestuous relationship between lawyer Royall (his occupation often acts as his first name), a leading citizen of the small town of North Dormer, and Charity Royall, who comes to live with lawyer Royall and his wife after he successfully prosecutes a criminal case in which the defendant is Charity's father. Her father asks Royall to go to the mountain, a "colony of outlaws" (65), to get his child so that she could be "reared like a Christian" (73). Though Charity uses lawyer Royall's last name, he never legally adopts her, and a few years after his wife's death, Royall attempts to initiate a sexual relationship. When he returns to North Dormer after winning a case in a nearby town, he enters Charity's bedroom and when she asks what he wants, he explains that he is "a lonesome man" (29). Charity refuses to let him in her room, and though Royall subsequently proposes marriage, Charity uses the incident to bargain for a job as the town librarian and a woman, the deaf Verena Marsh, to stay in the house with them. Later, Charity falls in love with an architect, Lucius Harney, who is visiting North Dormer, and eventually becomes pregnant with his child. Though she contemplates an abortion, Charity finally decides to marry lawyer Royall, at least partially because she learns that Harney is engaged to another woman, Annabel Balch.[21] Though Charity initially believes

[21] Wharton's ending provoked substantial commentary from contemporary reviewers, and current literary critics continue to debate possible interpretations of Charity's affair with Harney and marriage to Royall. Surprisingly, some critics view the marriage in a positive light. For instance, Cynthia Griffin Wolff, who connects the novel's themes to Wharton's problems with the men in her life, suggests that *Summer* "offers a suggestion for attainable happiness" (232). More specifically, Royall "does offer a finite but attainable

that "compared to her sovereign right Annabel Balch's claim seemed no more than a girl's sentimental fancy" (228), Charity changes her position after she receives a letter from Harney in which "every word and every reticence was an avowal of Annabel Balch's prior claim" (230). Thus, for Charity, "Annabel Balch's prior claim" then trumps the "sovereign right" embodied in her child, and Charity's right becomes no right at all, a reversal of a rights claim that occurs several times throughout the novel, particularly in discussions of marriage.

---

form of fulfillment" (243). Other critics, however, question the nature of whatever fulfillment the marriage may provide. John W. Crowley argues against contemporary reviews of *Summer* that viewed the novel's plot as "'a conventional romance of seduction and betrayal'" (86) and extends his critique to literary critics who read Charity's marriage in a positive light. Crowley suggests instead that *Summer* is a "radically feminist novel" and agrees with Lawrence Gilman's assertion that Wharton "uses the hackneyed conventions of the romance of seduction and betrayal for her own ironic purposes" (86). For Crowley, positive readings of Charity's marriage overlook "the enforced nature of Charity's 'participation': her 'salvation' by marriage incarcerates her in North Dormer, a society built on the sexual and economic hegemony of men over women" (87). Similarly, in *Edith Wharton's Argument with America,* Elizabeth Ammons provides a scathing indictment of the marriage, arguing that "the final union between Charity and Royall is not merely depressing; it is sick" (133). In contrast, Jean Blackhall provides a more ambivalent response than Wolff, Crowley, and Ammons. Blackhall reads the ending as Charity's "qualified acceptance" of Royall and concludes that, given Wharton's use of window scenes to project "Charity's state of mind as on a screen, defining the limits, the objects, the range of her vision" (120), "the view from a North Dormer is to remain Charity's lot in life" (125). As Blackhall's comment suggests, Charity's marriage resituates her within the community of North Dormer, a community that often failed Charity when she most needed its support. Other critics offer psychoanalytic readings of Charity's relationships with both Royall and Harney. Kathy Grafton draws on Freudian theory (particularly Freud's claim that men need "to separate feelings of desire from feelings of true affection and esteem" [353]) to argue that Charity's relationship with Harney is characterized by Harney's "need for a certain degradation of Charity to occur before he can find her sexually accessible" (350). However, Grafton completely ignores Charity's relationship with Royall and the ways in which it might complicate both her reading and Freudian theory more generally because Royall's view of Charity tends to merge desire and esteem. Rhonda Skillhern also turns to psychoanalysis to provide a "multilayered analysis" that includes "literary theory, gender studies, semiotics, and anthropology" as a way to "attend to the resisting voices and gestures in *Summer*" (119). Skillern seems particularly interested in the ways in which Lacanian psychoanalytic theory can contribute to a fuller understanding of the text than previous critics have offered. Specifically, Charity "must come to terms with the symbolic order [Lacan's Law of the Father]...through courtship, social ritual, and finally marriage" (117). Thus, *Summer* "addresses the question of whether a woman can act, think, create or even exist in ways that are not defined and interpreted by the patriarchal symbolic order" (121). For Skillern, Charity resists "incorporation" into the symbolic order but finally succumbs to it (117). Though Skillern does note that Lawyer Royall, as a representative of the law, represents a major part of the symbolic order (here literally the Law of the father), she does not explore the specific role that law plays in the Lacanian symbolic or even in its more general terms as a force that shapes the material conditions of Charity's life.

As I pointed out in my discussion of *The Reef*, Wharton's characters often claim rights, but since the claims themselves do not typically lead to a just resolution of the issues at hand, Wharton suggests that rights claims may be better understood in terms of their origins in contracts, both the social contract and contracts between individuals. Given Wharton's use of rights discourse throughout *Summer*, it is important to consider what it means to claim a right, to recognize a right, and even to define a right. As I mentioned earlier, Mary Ann Glendon points out the limitations of rights discourse. However, for Glendon, the solution is not abandoning the entire tradition of rights. Since rights discourse "captures our devotion to individualism and liberty, but omits our traditions of hospitality and care for the community," Glendon believes that the best answer lies in renewing "our strong rights tradition" in a way that takes into account traditions of civic virtue that current rights discourse overlooks (xii). Though Glendon suggests that this distorted version of rights discourse emerged fully in the late twentieth century, Wharton's novel suggests otherwise. Indeed, Wharton's use of rights discourse in *Summer* exemplifies many of the same problems noted by Glendon. However, Wharton does not share Glendon's qualified faith in civic virtue nurtured within specific communities as a viable means through which rights discourse can be revitalized. Unlike Glendon, Wharton's critique of rights depends upon an equally devastating critique of specific communities. Indeed, both North Dormer and the mountain foster negative, not positive, liberty. More often than not, Charity claims not specific rights to exercise her own liberty but points out instances in which other people have no right to infringe on what she considers her liberty.

Royall proposes to Charity several times during the novel, and Wharton's attention to rights discourse throughout their discussions of marriage is quite telling. Royall's first proposal occurs shortly after the incest scene in which he asserts, to return to Carole Pateman's terminology, his sex right to Charity and then proposes marriage in an effort to legitimize and justify a sexual relationship with her. In contrast, Royall's second proposal, which occurs after Charity has been seen leaving Lucius Harney's boarding house at a very late hour, seems to undermine his earlier claim to his sex right. Indeed, in an effort to get Charity to accept his proposal, he concedes "I've no claim on you" (117), a move that implicitly acknowledges Charity's desire to view herself as autonomous, even as he undercuts the autonomy she seeks. In the third discussion about marriage, rights claims explicitly provide the vocabulary to describe their situation. When Royall again hints at marriage and points out that her behavior with Harney is ruining her reputation in North Dormer, Charity contends "You've got no right to talk to me. I can do what I please." (204). Ever the lawyer, Royall counters with his own version of their respective rights:

> See here, Charity—you're always telling me I've got no rights over you. There might be two ways of looking at that—but I ain't going to argue it. All I know is I raised you as good as I could, and meant fairly by you always—except once, for a bad half-hour. There's no justice in weighing that half-hour against the rest, and you know it. If you hadn't, you wouldn't have gone on living under my roof. Seems to me the fact of your doing that gives me some sort of right; the right to try and keep you out of trouble. I'm not asking you to consider any other. (205)

Though Royall claims that he will not "argue" his point, he does provide a justification for the right he believes he has with regard to Charity; according to Royall, Charity's actions (or lack thereof since she continues to live with him) amount to tacit consent, an unwritten contract that provides for the terms of their relationship. Charity, however, refuses to recognize his right, and when Harney arrives, Royall urges her to "ask him when he's going to marry" her, a question he knows Charity is afraid to ask (207). Royall's long speech about rights indicates the significance of rights discourse as a way to describe and to structure their relationship, and the last proposal reinforces further this point. After Charity realizes she is pregnant with Harney's child, she returns to the mountain because she is unable to go through with an abortion and does not believe she can return to North Dormer. When Royall finds her, he proposes again, but Charity cannot articulate fully her response. She only says "I can't--" and then stops mid-sentence because "she was not sure if she was rejecting what he offered, or already struggling against the temptation of taking what she no longer had a right to" (270). In the first case, Charity thinks of the proposal as a contract open to rejection, and the contractual language implies that Charity still wants to think of herself as autonomous, despite the limited options available to her. Similarly, in the second case, Charity's sense that marriage is an option that she may or may not have "a right to" exercise indicates her desire for autonomy even as she understands that a no-right limits that autonomy. In both cases, Wharton explicitly establishes that a right typically is understood to refer to a claim on a particular thing, a point that forces careful consideration of Wharton's use of rights discourse throughout the novel.

These examples of rights claims in discussions of marriage represent only a partial account of Wharton's use of rights discourse. Of all the characters in the novel, only Charity, lawyer Royall, and an elderly man from the mountain, whom I will discuss later, make claims on and against each other in terms of rights. Royall's dependence on rights discourse could certainly be attributed to his occupation. However, Wharton also characterizes Charity in particular as one who wants to see herself as a possessor of rights that often turn out to be negative rights, no-rights, to prevent intrusions by others. Indeed, in only one instance does Charity assert a right to a specific thing—her name, a name to which she has no legal right until she eventually marries lawyer Royall. When Charity takes Harney on a tour of architecturally-significant local homes, they visit Liff Hyatt's house, located halfway between North Dormer and the mountain from which Charity originally comes to North Dormer. When one of the women refers to her as "the girl from Royall's," Charity reintroduces herself as "'Charity Royall, . . .as if asserting her right to the name in the very place where it might have been most open to question" (84). In other cases, Charity defines her rights by ascribing a "no right" to someone else. For instance, Charity believes that her position as town librarian carries with it specific rights and responsibilities. Charity meets Harney for the second time, also in the library, and discovers that he let himself in with a key that Miss Hatchard, Harney's aunt and a prominent North Dormer citizen, gave to him. For Charity, Miss Hatchard's actions go beyond her rights: "Miss Hatchard's got no right to give her key to other folks, anymor'n I have. I'm the librarian and I know the by-laws. This is my library" (46). Here, Charity does not assert her own right to act in a certain way; instead, she describes Miss Hatchard's "no right" to act, which suggests that Charity can make only an indirect claim

for her own autonomy. Charity believes, at the same time, that she has the power to decide whether or not to recognize the rights of others. For instance, when Royall tries to ask Charity about her relationship with Harney, Charity responds with "silence, determined not to recognize his right to question her" (100). In each of these examples, Charity's actions suggest that she believes that by virtue of being a right holder, she can also determine when to recognize and thus call into being the rights of others. Put another way, Charity's logic implies that a right does not exist unless someone else is willing to recognize it as such. When framed as negative liberty (i.e., a no right), rights discourse facilitates Charity's view of herself as autonomous by masking her inability to assert rights and situating her in opposition to a community against which she must protect herself.

Indeed, the novel begins by calling our attention not to Charity herself but the place in which she is situated: "A girl came out of lawyer Royall's house at the end of the one street of North Dormer. . ." (7). Then, a few sentences later, Wharton describes a few trees scattered along the street that "cast almost the only roadside shadow between lawyer Royall's house and the point where, at the other end of the village, the road rises above the church and skirts the black hemlock wall enclosing the cemetery" (8). Thus, from the novel's opening page, Charity is described specifically in relation to the lawyer's house and the church, both of which symbolize institutions that define the community of North Dormer by determining community rights and duties. Though Charity once visited Nettleton, a nearby town, and then understood that "North Dormer was a small place," she eventually realizes, despite a brief "thirst for information," that it is "easier to take North Dormer as the norm of the universe than to go on reading" (10).

As the norm of Charity's universe, North Dormer once again seems small when she sees Lucius Harney for the first time:

> The sight of the stranger once more revived memories of Nettleton, and North Dormer shrank to its real size. As she looked up and down it, from lawyer Royall's faded red house at one end to the white church at the other, she pitilessly took its measure. (10)

Again, Wharton calls attention to the law and the church as the major reference points within North Dormer. Between the church and lawyer Royall's house, Charity sees a "village of the hills, abandoned of men, left apart by railway, trolley, telegraph, and all the forces that link life to life in modern communities" (10-11). For Charity, what North Dormer lacks is contact with the outside world, yet the modern means of communication she mentions seem inappropriate for communication within a small community, and the failure of local communication, communication among the citizens of North Dormer and not with the outside world, contributes most to Charity's situation.

The best examples of the ways in which North Dormer fails Charity are its responses to her changing relationship with lawyer Royall and her affair with Harney. For instance, after the near-rape incident, Charity does seek help from Miss Hatchard, who once tried—after Mrs. Royall's death—to get Charity to leave North Dormer and lawyer Royall to attend boarding school. Charity asks Miss Hatchard "to be appointed librarian" because she "want[s] to earn enough money to get away" or, if she cannot leave, "to have another woman in the house" (30). Miss Hatchard does not know how to respond and can only suggest that the housework must be too difficult for Charity; Charity, in turn, simply agrees because "she understood that Miss Hatchard had no help

to give her and that she would have to fight her way out of her difficulty alone" (31). With the housework in place as an excuse, Miss Hatchard "promise[s] to do what she. . . .[can]" (31). However, she is also quick to note that "there were people she must consult: the clergyman, the selectmen of North Dormer, and a distant Hatchard relative at Springfield" (31). Miss Hatchard's response clearly suggests that Charity's predicament is a community problem, but the community simply cannot address the issue of incest, which remains unstated throughout the scene. Miss Hatchard also suggests that Charity is at least partially to blame for her present situation because she refused to go away to school, and she reminds Charity of her duty to Royall, both by using Charity's name and by drawing attention to Charity's origins: "I know Mr. Royall is. . .trying at times; but his wife bore with him; and you must always remember, Charity, that it was Mr. Royall who brought you down from the mountain" (31-32, ellipses in original). As I will discuss in more detail later in this chapter, Charity actually gets the position as librarian not because of Miss Hatchard's assistance but through a bargain with lawyer Royall: "he had obtained the place for her at the cost of considerable manoeuvering, as she guessed from the number of rival candidates, and from the acerbity with which two of them, Orma Fry and the eldest Targatt girl, treated her for nearly a year afterward" (37). Once again, Charity defines herself against the community.

Charity's problems do not end once she becomes librarian and can earn her own money. When Lucius Harney arrives in town, he visits the library and finds the books growing moldy, the light inadequate, and the building in general disrepair. He complains to his aunt, Miss Hatchard, who then attempts to inspect the library on an afternoon when Charity has already locked the building before the official closing time. When Royall

brings these complaints to Charity's attention, she describes them as "charges against her," a description that captures her adversarial relationship with the other members of the community (43). Later, after Charity learns that Harney is the one who complained, Charity asks why he, specifically, would do that to her:

> I could understand Orma Fry's doing it, because she's always wanted to get me out of here since the first day. I can't see why, when she's got her own home, and her father to work for her; nor Ida Targatt, neither, when she got a legacy from her step-brother on'y last year. But anyway we all live in the same place, and when it's a place like North Dormer it's enough to make people hate each other just to have to walk down the same street every day. But you don't live here, and you don't know anything about any of us, so what did you have to meddle for? (47).

For Charity, such a complaint can only be a personal charge and not a disinterested comment about the condition of the library. Her response again points out the limitations of North Dormer as a viable community, even as she partially attributes its failings to individual grudges. As Charity's response indicates, Wharton often makes it difficult to determine whether these limitations lie with particular individual responses or with a particular community.

Wharton's critique becomes more obvious when one compares the two communities represented in the novel. Wharton often describes North Dormer in opposition to Charity's birthplace, the mountain, specifically "the scarred cliff that lifted its sullen wall above the lesser slopes of Eagle Range," that "seemed almost to cast its shadow over North Dormer" (11-12). North Dormer's citizens do not hesitate to remind

Charity repeatedly about her origins; indeed, "Charity Royall had always been told that she ought to consider it a privilege that her lot had been cast in North Dormer" because "compared to the place she had come from, North Dormer represented all the blessings of the most refined civilization" (11). Even though she has lived in North Dormer since she was a small child, she is still associated with the mountain. Even her name serves to remind her of her origins:

> she had been christened Charity (in the white church at the other end of the village) to commemorate Mr. Royall's disinterestedness in 'bringing her down' and to keep alive in her a becoming sense of her dependence. (24)

As a child of the mountain, Charity remains somehow apart from North Dormer and never fully included in the community, and, once again, the law and the church provide the frame within which North Dormer is situated. According to lawyer Royall, the mountain community represents that which is outside the law and consists of "a little colony of squatters" that "had contrived to keep the law at bay" (71). He tells Harney that "the Mountain belongs to this township, and it's North Dormer's fault if there's a gang of thieves and outlaws living over there, in sight of us, defying the laws of their country" (71). More specifically, county officials, such as the sheriff, tax collector, and coroner, are afraid to go up the mountain, and, according to Royall, "when they hear of trouble on the Mountain the selectmen look the other way, and pass an appropriation to beautify the town pump" (71). In addition to ignoring legislatively enacted laws, those on the mountain also apparently ignore religious laws. Royall points out that though "they think a lot of Christian burial," they do not ask the "minister up to marry them. And they

never trouble the Justice of the Peace either. They just herd together like the heathen" (71). Thus, both the secular and sacred law of North Dormer, and civil society in general, seem to stand in opposition to the lawlessness of the mountain.

Royall's characterization of the mountain hints at the narrative of the origin of civil society, described by many social contract theorists in opposition to the state of nature, and implies that one origin of rights discourse is in a social contract that replaces the state of nature with a civil society governed by law, a point that Wharton emphasizes further in the Fourth of July scene. Wharton's attention to the United States' narrative of revolution and independence highlights one origin of rights discourse in the Declaration of Independence with its Lockean guarantee that "all men are created equal" and "are endowed by their Creator with certain unalienable Rights," including the rights to "Life, Liberty, and the Pursuit of Happiness." As I mentioned in my account of the history of social contract theory in Chapter One, most political theorists attribute Jefferson's ideas to some combination of those of Locke (particularly his emphasis on individual rights) and Rousseau (particularly his emphasis on civic virtue and responsibility) on the social contract and the civil society it creates. However, Wharton's critique of rights discourse exposes a model that owes more to Hobbes, particularly his characterization of the state of nature and emphasis on power relations, than to his more benign successors. For instance, Royall's earlier description of the mountain residents "herding together like heathen" suggests a Hobbesian state of nature in which "there are supposed no laws of matrimony" (*Leviathan* 133). Quite literally, Hobbes suggests that, in the state of nature, the "condition of man. . .is a condition of war of every one against every one. . .[;] every man has a right to every thing; even to one another's body" (86-87). As I will discuss in a

moment, Hobbes' account of the state of nature could well apply to life on the mountain. As I mentioned in Chapter One, Carole Pateman critiques the social contract because it depends upon a sexual contract. More specifically, Pateman points out that Hobbes' account of the social contract reveals what both Locke and Rousseau elide: "for Hobbes, all political power was absolute power, and there was no difference between conquest and contract" (44). For Pateman, contract and conquest merge in the sexual contract; indeed, "political right originates in sex-right or conjugal right" (2), and this conjugal sex right is the source of the subjection of women: "the 'original' political right of government" Pateman concludes, "was, therefore, not paternal but conjugal" (93).

In the Fourth of July scene, Wharton makes explicit these connections between political right and sex right. Charity goes with Harney to the nearby town of Nettleton to attend the annual Fourth of July celebration, and though she wants her decision "to assert her independence," she still tells everyone that she plans to attend a picnic in a different town (126). To emphasize political right, Wharton fills the scene with references to American history, particularly the American Revolution, and to highlight its connection to sex right, she couches those references in extremely sexual language. Charity's first impressions are of bus drivers who offer to take tourists to "Eagle House" and "Washington House" and must yell to be heard over "the popping of fire-crackers, the explosion of torpedoes, the banging of toy-guns, and the crash of a fireman's band trying to play the Merry Widow" (131). The fireworks display, the highlight of celebration, climaxes with a scene from the American Revolution:

> For a moment the night seemed to grow more impenetrably black; then a great picture stood out against it like a constellation. It was surmounted

> by a golden scroll bearing the inscription, "Washington crossing the Delaware," and across a flood of motionless golden ripples the National Hero passed, erect, solemn and gigantic, standing with folded arms in the stern of a slowly moving golden boat. (148)

The phallic image of Washington is reinforced by the description leading up to this sexualized culmination of the celebration. Just before Washington appears, " a murmur of expectation ran through the crowd, " and a voice in the crowd "excitedly" says "Now—now" as if on the verge of an orgasm while "Charity, grasping the hat on her knee, crushed it tight in an effort to restrain her rapture" (148).

The scene also directly connects the narrative of national independence to sexual power, a move that calls to mind Pateman's feminist critique of the social contract as a sexual contract. Indeed, Wharton, in the same scene, presents a sexual contract that directly links law and sex by having lawyer Royall appear in the company of a known prostitute, Julia Hawes. According to North Dormer gossip, Julia became pregnant out of wedlock and apparently turned to prostitution as a means of support. When Royall sees Charity with Harney, he calls her a "damn—bare-headed whore" (151), a comment Charity ignores when she simply asks him to "come home" (152). By calling Charity a whore, Royall unequivocally situates Charity as a party to a sexual contract, and in the next scene, Charity enters just such a contract. Later that night, Charity is so troubled by his accusation that she decides to leave North Dormer. The next morning, on her way to the mountain, she accidentally meets Harney. When Harney asks her to return with him to North Dormer, Charity refuses and explains that Royall would not have called her a whore if he had not wanted her "to be like those other girls" so that "he wouldn't have to

go out" (168). Harney, though shocked by her "vile" revelation, does not hesitate to consummate their relationship, and Charity eventually decides to return to North Dormer to await Harney's return (168).

I might also point out here that, in addition to her sexual relationship with Harney, Charity is also a party to several exchanges akin to Pateman's idea of a sexual contract. As I mentioned earlier, Charity had the opportunity to leave North Dormer to attend boarding school, but she tells Miss Hatchard that she "decided not to leave North Dormer" because "Mr. Royall's too lonesome" (26). When Miss Hatchard implies that "there are other reasons" to leave that Charity is "too young to understand," Charity replies that she does, in fact, understand what Miss Hatchard cannot verbalize. Even as Charity's answer causes her to blush, Miss Hatchard does tell Charity "you can always come to me" (27). Shortly after learning of Charity's decision to stay, lawyer Royall gives Charity her first gift, a "Crimson Rambler" (27). Though no terms are explicitly discussed, this exchange establishes the foundation for the bargain Charity enters with Royall after he makes sexual, quasi-incestuous advances. She demands her own terms: "I want you should get Miss Hatchard and the selectmen to take me at the library: and I want a woman here in the house with me" (33). However, Royall counters with a marriage proposal that makes the potentially sexual dimension of their relationship explicit. Charity rejects his proposal, claiming "I suppose you think it would be cheaper to marry me than to keep a hired girl, . . .but I guess you're not going to get your mending done that way twice" (34). Eventually, Royall capitulates to Charity's demands, and throughout this exchange, Wharton foregrounds the economic dimension of this exchange by suggesting that Charity believes she can mitigate the limitations of her

situation by earning her own money. Indeed, it is this bargain with Royall that leads to Charity's position as librarian, a position from which she derives some of her rights and responsibilities.

The economic issues are highlighted further in subsequent exchanges among Charity, Harney, and Royall in which payments and gifts become interchangeable. For instance, when Harney rents a horse from Royall, Royall gives Charity the money, and "she immediately guessed that the unwonted present—the only gift of money she had ever received from him—represented Harney's first payment" (70). John Crowley points out that Royall "makes a connection. . .between the use of his horse and the use of his ward" and that through his gift, he is both "implicitly reminding Charity that he will reward her loyal submission" and "warning her not to forget that she belongs to him" (89).[22] Another key exchange concerns the blue pin Harney buys for Charity. When he presents her with the gift, Charity recalls "other girls whom she had heard planning to extract presents from their fellows," and she is afraid that Harney will think "she had leaned over the pretty things in the glass case in the hope of having one given to her" (135). As it turns out, the pin becomes a down payment on their sexual relationship and later provides the collateral to secure a consultation for Charity with Dr. Merkle, a female physician who performs abortions.

Shortly after they begin their sexual relationship, Harney leaves North Dormer, and for Charity, his "reiterated promises to return seemed almost wounding" (212). Eventually, Charity learns that Harney is engaged to Annabel Balch. Though she is

[22] That the gift is ten dollars seems particularly significant when Charity visits Nettleton with Harney to see the fireworks. Harney pays ten dollars for a carriage ride, and Charity realizes that the money "had given

initially angry, she realizes that "Annabel Balch was, if not the girl Harney ought to marry, at least the kind of girl it would be natural for him to marry" (220). Charity's response emphasizes Harney's prior commitment; she writes Harney "I want you should marry Annabel Balch if you promised to. . . .I feel I'd rather you acted right" (221). Charity, however, soon changes her mind when the reality of her pregnancy hits home after her visit to Dr. Merkle. As "the mother of his child," Charity can see herself "as Harney's wife" (228). Indeed, "compared to her sovereign right Annabel Balch's claim seemed no more than a girl's sentimental fancy" (228). However, as I mentioned earlier, Annabel's "prior claim" ultimately trumps Charity's "sovereign right," a point that suggests, as Hobbes does, that all rights flow from contracts. With no hope of a marriage to Harney, Charity faces the reality of her situation; she has "no right" and no real options. Alone, pregnant, and unable to go through with an abortion, she decides that her best option is to return to the mountain, to something like the state of nature, where "the harsh code of the village was unknown" (238), rather than become a prostitute like Julia Howes.

However, the harsh code of the village is complemented by the equally harsh code of the mountain. In order to understand Charity's marriage to lawyer Royall, it is important to consider Charity's decision to return to the mountain and her experiences there. In the Hobbesian world of the mountain, the "general inclination of all mankind" is "a perpetual desire and restless desire of power after power, that ceaseth only in death" (*Leviathan* 66). On the mountain, the desire for power manifests itself as an animalistic

---

them twenty minutes of pleasure" (142).

instinct for survival. Indeed, Wharton typically describes the mountain residents in animalistic terms. For instance, Mr. Miles, the preacher who drives Charity to her mother's cabin, lights a candle that illuminates "the pale aguish heads that started out of the shadow like the heads of nocturnal animals" (248). Further, Charity arrives only to find her mother dead, her face a death mask: "There was no sign in it of anything human: she lay there like a dead dog in a ditch" (250). Against the backdrop of Miles' funeral speech, Charity's kinfolks fight about the ownership of a stove that may have belonged to her mother. Indeed, this is the only scene in which someone other than Charity or Royall asserts a right. First, an older man claims "I bought the stove. [. . .]I wen' down to Creston'n bought it. . .n' I got a right to take it outer her. . .n' I'll lick any feller says I ain't. . ." (252, ellipses in original). The man's defense of his claim could be taken straight from Hobbes' account of the state of nature in which individuals fight for what they desire: "if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, . . .endeavor to destroy, or subdue one another" (*Leviathan* 83). Indeed, the mountain man asserts his right to the stove as well as his right to defend his right by force. Just as he asserts his right to the stove, another man in attendance seems "to assert some sort of right of kinship with the dead woman," and together they carry her body to her grave (253). This strange gesture merges property rights and kinship rights as both men stake a claim of some kind.

This scene exposes the code of the mountain—the natural right of self-preservation—and contributes to Wharton's critique of the version of community provided in North Dormer. By presenting the mountain as a Hobbesian state of nature, Wharton undercuts any appeal to natural law as an ethical supplement to the "harsh code"

of North Dormer. Unlike Alcott's attention to natural law—that which is outside positive law—as a supplement to positive law, Wharton allows no return to an idyllic state of nature complete with natural law and natural rights to solve Charity's problems or to provide the model for a meaningful community. Indeed, within this Hobbesian world, natural law merely provides for the right of self-preservation during a state of war, a war that amounts to a Darwinian survival of the fittest.

Not surprisingly, in the last chapters of the book that lead up to the funeral on the mountain, Wharton turns to deterministic language to describe Charity's situation. With Harney, Charity experiences "a fatalistic acceptance of his will" (175). When she later learns that he is engaged, this sense of fatalism intensifies: "the more she thought of these things [his engagement and Annabel Balch] the more the sense of fatality weighed on her: she felt the uselessness of struggling against the circumstances" (220). More specifically, Charity cannot "imagine what a civilized person" would do because she feels "herself too unequally pitted against unknown forces" (221). By the time she agrees to marry Royall, she feels "only a confused sensation of slipping down a smooth irresistible current" (273). Against this irresistible current, the marriage contract provides the only lifeline left for Charity.

In *Summer*, all rights flow from contracts, and Charity's marriage to lawyer Royall reenacts the transition from Hobbes' state of nature to civil society. With their marriage comes justice as they pronounce each other "good" in one of Wharton's most bizarre conclusions (290-91). Her child, the "sovereign right" Charity cannot claim against Harney, becomes the legal property of Royall, North Dormer's version of royalty. When viewed through the lens of Carole Pateman's theory, Charity's marriage to her

father-figure, Royall, makes perfect sense not because, as Pateman suggests, it reveals political authority as conjugal rather than paternal but because it exposes such authority as at once conjugal and paternal. In a final gesture that brings several exchanges together and makes clear that the conjugal is the paternal, Charity redeems the blue pin, a symbol of her sexual contract with Harney, from the abortion doctor with the forty dollars she receives from Royall after their marriage legitimates their relationship.

Life-Leases on the Future: Legal Discourse in *The Children*

The ways in which law legitimates specific relationships becomes even more apparent in *The Children*, one of Wharton's last novels and a good concluding example for this chapter. As I mentioned in the introduction, Martin Boyne, the Wheater children's advocate and father figure, falls in love with the fifteen-year-old Judith Wheater. Interestingly, in the opening scene Martin encounters the little Wheaters on an ocean liner and, before he sees the entire group, mistakenly assumes that Judith is the two-year-old Chipstone's mother. Indeed, though Martin thinks to himself "it ought to be against the law" that Judith, herself a child, could actually be a mother (11), he later justifies breaking the imagined law himself when he proposes to Judith. Judith, however, does not even understand what Boyne means; she instead believes that he is offering to adopt legally all of the little Wheaters, including her. When Boyne realizes that Judith does not understand his proposal, he masks his feelings by urging her not to "take such terrible life-leases on the future" or to expect too much from his "promise" to intervene

(268). Both Martin and Judith, then, envision the legalization of their relationship, though in admittedly different ways.[23]

In order to propose to Judith, Boyne must first reconcile himself to breaking his ties to his long-term friend, Rose Sellars—the woman he has always wanted to marry. Legal issues also help to define Boyne's relationship with Rose. Though Rose is a widow, she does not want to marry Boyne too soon and risk losing the inheritance she expects to receive from her aunt. Given Rose's attention to practical legal matters, it is not surprising that, when she learns that Boyne has agreed to be the children's temporary guardian, she suggests that he talk to her friend, Mr. Dobree, who happens to be a lawyer, though she admits she does not "see how the biggest fortune, and the cleverest lawyer in the world, could keep the Wheaters from ordering their children home the day they choose to" (188). Boyne admits she is right even as he protests Dobree's involvement because he thinks Dobree is attracted to Judith, a charge Dobree later turns on Boyne. Despite Boyne's irritation at Rose's response, he cannot "trick himself into believing he had a grievance against her" (226). Indeed, he realizes that "in pledging himself to his strange guardianship he had virtually pledged Mrs. Sellars also, and without even making his promise depend on her consent" (226). Here Boyne contemplates the nature of his obligations to the children and to Rose, and though he avoids overtly legalistic rights claims to describe his obligation to Rose, his attention to his promise has both legal and

---

[23] Here, I might mention that literary critics have interpreted their relationship, as well as Boyne's relationship with Rose Sellars, who is his own age, in quite different ways. In *Edith Wharton's Argument with America,* Elizabeth Ammons, in keeping with her reading of *Summer*, argues that since Boyne "wants a sexually unattainable, and only partially formed, dependent person who excites his imagination and needs his protection," he necessarily picks Judith Wheater (175). For Cynthia Griffin Wolff, "marriage to Rose Sellars...assumed an ominous aspect now that Judith has begun to throw open the windows of his soul" (376). In contrast, Judith Sensibar draws on the work of Eve Sedgwick to argue that Wharton reinterprets

ethical significance. For Boyne, the relevant issue seems to be the ethical weight he attaches to his promise, and by asserting his promise, Boyne formalizes his tenuous connection to the children. However, as Rose suggests, Boyne's "trial guardianship" carries with it certain legal responsibilities. As she points out, "suppose anything goes wrong during these next few months? You'll be answerable for whatever may happen" (156).

As I suggested in the introduction, the children often become the site of conflicting rights, even as those rights themselves raise ethical issues that seem unresolved according to the law. For instance, Zinnie's request to speak to her attorney before making a decision about whether or not to return to her mother takes on even greater significance when it is situated within the context of other claims about her future—a future only tenuously secured by the rights asserted by and about her. Zinnie's mother, Zinnia Lacrosse Wheater Wrench, foreshadows Zinnie's appeal when, early in the novel, she finds Zinnie upset by an argument with one of the other children and claims "I wish I had my lawyer here. The way those Wheater people treat my child—" (64-65). Like many of the other parents, Zinnia structures her relationship with her child according to the law; indeed, the terms of her divorce afford her "a right to see the child at stated intervals" though Cliffe gets custody and "legally. . .has the final say" (154). Cliffe, in turn, merely ignores Zinnie as well as the other children—except Chipstone.

Similarly, when Princess Buondelmonte suggests that Zinnie might want to return to her mother, the conversation adopts "the tone of a legal debate" (242). Indeed, Boyne

---

"'male homosexual panic'" so that the "real subject" of the novel is Boyne's "frantic attempts to deny his fear of the absence of desire" (576).

is forced to concede a key point—Buondelmonte's legal rights: "if your husband has a right to his children, no one can prevent his getting him" (242). To mitigate the legal claim, Boyne attempts to recast the debate according to different terms. Much like the case he presented earlier to the children's parents, Boyne contends that "the real issue seems. . .quite different" (242). However, like Cliffe Wheater, the Princess is not persuaded by Boyne's vague claim. Earlier in the novel, Boyne compares his conversation about the children with Cliffe, who constantly asserts his legal rights, to requesting permission from a "potentate" to cross "his territory" (129). According to Boyne,

> With the potentate it would have been only a question of matching values; of convincing him of the material worth of what was offered. In such negotiations the language spoken, when interpreted, usually turned out to be the same. But in his talk with Wheater, Boyne had the sense of using an idiom for which the other had no equivalents. Superficially their vocabularies were the same; below the surface each lost its meaning for the other. (129)

Boyne here describes the very failure of common terms that theorists such as Lyotard describe. What remains unclear, however, is exactly why those terms fail.

At least one contemporary reviewer discussed Wharton's view of the law. For Percy A. Hutchinson, writing for the *New York Times Book Review*, *The Children* is a novel about divorce, an issue, Hutchinson notes, that Henry James also addressed in *What Maisie Knew*. Hutchinson writes:

> The law, which has laid upon it the duty to finish one way or another any piece of business that comes before it, has its solution, awards to one or another, or parcels out between both the fruits of the one-time union, and move on with unfeeling stride to other matters. But oh, how blind Justice! Says Henry James, in effect. . . .Mrs. Wharton never bothers with the law, for she is aware that it is impotent. (451)

Hutchinson rightly suggests that the exercise of justice often seems absolute though he certainly minimizes Wharton's investigation of the law. If the law is, indeed, impotent, then it seems surprising that the law plays such a prominent role in the resolution of the arguably legal issues raised in the novel. Indeed, the children's future is determined as a matter of the law, however limited that law may be. For Wharton, it seems, both individuals and specific communities are more to blame for the failure of law than the inadequacies of the terms themselves. Much like the other writers I have discussed here, Wharton uses legal discourse to address both legal and ethical issues and to suggest that such discourse, despite its limitations, continues to provide a compelling vocabulary to make claims about particular human needs.

CONCLUSION

"Without Contraries there is no progression."
William Blake, *The Marriage of Heaven and Hell*

Throughout this project, I have examined the use of legal discourse, particularly the language of contractual obligation and rights, in selected works by Louisa May Alcott, William Dean Howells, Henry James, and Edith Wharton. By carefully examining specific instances of legal discourse in these texts, I have suggested its importance to these writers as a means to articulate specific claims about human needs and to challenge the ways in which, generally speaking, law and philosophy respond to these claims. Thus, I have argued that legal discourse works in two primary ways in these writers' texts: first, legal discourse marks the intersection of legal and ethical claims, and second, legal discourse calls up both the limits and possibilities of law, and by extension philosophy, as a means to resolve such claims. While this project implicitly suggests that traditional disciplinary boundaries between law, literature, and philosophy can be rendered productively fluid, it raises an important question: How might attending to legal discourse help us understand a particular text?

Fortunately, other scholars answer this question in ways that have influenced the shape of this project. Indeed, if not for the work of Wai-Chee Dimock, Martha Nussbaum, and Brook Thomas, I might never have imagined the fruitful convergence of law, literature, and philosophy. While Dimock, Nussbaum, and Thomas do not address legal discourse specifically, they do offer compelling justifications for why we should complicate traditional disciplinary boundaries. Each of these critics argues, in very different ways, that literature provides a space from which both law and philosophy can

be criticized. In *Residues of Justice: Law, Literature, and Philosophy,* Dimock contends that literature, as "the domain of the incommensurate," provides "a testing ground no jurist or philosopher can afford to ignore" (10). Literature reveals the inadequacy and incompleteness of "the self-image of justice," common to both law and philosophy, "as the supreme instance of adequation. . .that perfectly matches burdens and benefits, action and reaction, [while] resolving all conflicting terms into a weighable equivalence" (2). Though Dimock seems to recognize the power of literature, her argument depends on the binary opposition of the commensurate, and thus reasonable, realm of law and philosophy to the incommensurate realm of literature. As a result, she tends to overlook the ways in which literature might participate in rational deliberation.

While Dimock's critique of reason for "its transcendent unity and its categorical imperative" implies that achieving justice might require the rejection of reason (9), Martha Nussbaum offers a different conclusion in *Poetic Justice: The Literary Imagination and Public Life.* Though both Dimock and Nussbaum recognize the power of literature to underscore the limits of both law and philosophy, Nussbaum argues that "storytelling and literary imagining are not opposed to rational argument, but can provide essential ingredients in a rational argument" (xiii). Thus, "the literary imagination is part of public rationality, and not the whole" (xvi). Nussbaum finds in literature, then, "a central ingredient of an ethical stance that asks us to concern ourselves with the good of other people whose lives are distant from our own" (xvi). By exploring the intersection of legal and ethical issues, this project builds on Nussbaum's claim that literature can play a powerful role in rational deliberation.

In addition to my debts to Dimock and Nussbuam, I have been particularly influenced by Brook Thomas' *American Literary Realism and the Failed Promise of Contract.* Since my project defines legal discourse as, in part, the language of contractual obligation, I have found Thomas' work on contract theory particularly helpful, and I hope my project furthered his critique of classical contract law for its inability to live up to its promises. In *American Literary Realism,* Thomas admits that when he finished *Cross Examinations of Law and Literature*, an earlier work published in 1987, he "was convinced that contract in the law was simply a tool to legitimate an unfair regime of market-based economics" (xi). Further, Thomas points out that he did not completely reject this view in *American Literary Realism*; instead, he has "modified it" as he learned "to appreciate the 'promise of contract'. . .by experiencing the 'contract' that realistic texts offer their readers" (xi). More specifically, Thomas suggests that selected realist works illustrate the promise of contract because they "leave open the possibility that status is more of a problem than contract" (7) and "challenge the formalism of contract law by presenting promising as an interpersonal act that is grounded neither in a scientific appeal to the laws of nature [as in works of naturalism] nor a moral appeal to God's witness [as in sentimental works]" (45). Further, realist works "allow us to imagine a sense of individual agency without assuming the existence of an autonomous self" (18). Thomas grounds this vision of agency by turning to Hannah Arendt's theories about promising to suggest that "promising is a performative act, establishing a relationship that in part constructs the subjects participating within it" (287-88). Thus, "interiority itself is constructed in interpersonal exchanges enabled, not by a positive willing agent, but by a vacancy constitutive of selfhood" (284). Like Thomas, I am also reluctant to give up

entirely on contract theory and some version of human agency. However, I hope I have complicated his argument in several ways.

First, to supplement the critique of classical contract law that both Thomas and I provide, this project explored how contract law responded to its own limitations through neoclassical contract theory and, more recently, relational contract theory; future incarnations of my project might build on this by including additional legal cases and exploring the representation of contract law in late nineteenth-century popular culture.

Second, I have suggested a different version of contractual agency. Though I share Thomas' interest in an intersubjective model of the self, I find his version both confusing and problematic. For Thomas, agency depends both on a space between individuals created through the act of promising and a vacant space within those individuals so that they may be partially constructed by the act of promising. His version of agency, however, breaks down when he attempts to apply it to Edna Pontellier from Kate Chopin's *The Awakening*. Thomas admits that Edna cannot attain such agency because "it does not work in her relationship with her children" (293). Thus, Edna's agency, or lack thereof, cannot be contemplated from within his model because it fails to address parent-child relationships. In contrast, I have attempted to explore an account of contractual agency based on provisional equilibrium rather than autonomy, and I hope that a future project might develop further this version of agency by exploring both the intersubjective and deliberative aspects of agency.

Third, by limiting his argument to works by canonical realists, including Henry James, Mark Twain, and William Dean Howells, Thomas narrows the implications of his insights for exploring works from other genres. Through an analysis of legal discourse in

selected works by Louisa May Alcott and Edith Wharton, I hope I have provided a more complete account of the significance of legal discourse in late nineteenth and early twentieth-century literature and, in the process, suggested that an analysis of legal discourse can enhance our understanding of any text in which such discourse appears.

Throughout this project, then, I have depended on a rather general definition of legal discourse as the language of contractual obligation, rights claims, and even at times the adversarial language of the courtroom. The very breadth of this definition may prove problematic for some readers. However, after tracing the philosophical history of contracts, rights, and justice in Chapter One, this definition seemed appropriate given the diversity of approaches to these issues. What I find fascinating about legal discourse is that it often seems self-justifying in its inherent claim for some sort of legal, ethical, and/or moral authority. For instance, when a particular character claims a right, that claim contains an implicit appeal for the recognition of a need or desire, and carries with it a certain degree of authority. In this respect, Jurgen Habermas' contention that the language of the law possesses the unique ability to communicate with both lifeworld and system seemed especially relevant to this project. In contrast to Dimock's contention that the "language of justice" represents "a language of formal universals. . .that translates warring particulars into commensurate ratios" (*Residues of Justice* 2), I have suggested, following Habermas, that legal discourse is particularly situated to articulate claims that resonate both in the particular context of individual ethical deliberation and in the more abstract, universal context of public deliberation. In order to understand better how legal discourse might provide a bridge between these different realms, I situated legal discourse within its philosophical and historical contexts in social contract theory and

contract law. An exploration of these contexts revealed that both the strengths and weaknesses of legal discourse could be traced to a series of tensions in social contract theory and contract law.

Chapter One highlighted these tensions within social contract theory, and I will briefly restate them here. First, social contract theory attempts to negotiate the tension between freedom and constraint because individuals must agree to some limitations upon their autonomy so as to protect their autonomy. In order to preserve this image of consent, social contract theory often relies on an abstract version of agreement in which individuals are stripped of their socially-acquired characteristics, either by imagining the state of nature as, for instance, Locke and Hobbes do, or by positing a hypothetical thought experiment as Kant and Rawls do. Thus, the contract embodies a new beginning, a space in which individuals can define or redefine themselves without relying upon or being constrained by traditional hierarchies based on race, class or gender. However, such hierarchies often persist in spite of contract. Further, critics following Marx suggest that social contract theory actually masks and then justifies the very hierarchical social structure it claims to eliminate. Thus, the social contract invokes a model of autonomous agency that is, at best, unrealizable given material conditions, and, at worst, illusory and misleading.

Contract law, particularly classical contract, replicated many of these tensions, in particular the tension between hypothetical freedom and the real-world conditions under which that freedom must be realized and the tension between an ahistorical account of contractual agreement *ex nihilo* and a genealogy of contractual agreement as always already embedded within a complex web of social relationships. Neoclassical contract

theory attempted to address the tension between theory and practice by addressing contextual issues, such as the relative bargaining positions of the parties by inquiring into who benefited from or relied upon a particular exchange. In turn, relational contract theory highlighted the importance long-term contractual relationships that cannot be adequately described as a discrete, abstract exchange.

In Chapters Two through Five, I chronicled specific instances in which Alcott, Howells, James, and Wharton use legal discourse and suggested how such discourse works within their texts and what such discourse might reveal about their cultural milieus. In each author's work, legal discourse often implicitly invokes a kind of transcendent or universal authority even as it resonates within a particular situation; in this sense, legal discourse suggests the intersection of legal and ethical claims. Similarly, legal discourse, particularly contractual language, also illuminates the drama of human subjectivity: how to imagine agency as at once free and constrained.

For Alcott, social contract theory initially offers the possibility to overturn traditional patriarchal social relationships by offering people the ability to choose their obligations. Thus, in "M.L.," Claudia's marriage to Paul, a former slave, represents a potentially subversive act of choice that risks legal sanction. Indeed, both the marriage contract and the employment contract offer the possibility to choose one's destiny. For instance, in *Work,* Christie Devon sees each new contract as an opportunity to start over and to realize her dream of self-fulfillment. Alcott also draws attention to specific legal reforms by utilizing legal discourse to suggest the need to extend legal rights to women who have been historically denied those rights; though these rights may prove, at least in part, to be illusory guarantees of an even more illusory version of freedom, rights remain

important for women and people of color who continue, even today in the early twenty-first century, to struggle to assert their agency in spite of racism and sexism. Alcott's "M.L." demonstrates the importance of legal reform as Paul marks the moment he became a free man as the "moment my flesh and blood were mine" (19). Similarly, in "A Whisper in the Dark," Alcott stages Sibyl's predicament as an underage woman at the mercy of her uncle's perverse guardianship in order to show why full legal rights should be extended to women.

Like Alcott, Howells also believes in the power of a contract to provide a space for self-definition. In *A Modern Instance,* Bartley Hubbard, another orphan, views contracts as a way to structure future events without reference to past performance. Thus, a contract seems to create a clean slate for the future by severing all ties with the past. Similarly, in *A Hazard of New Fortunes,* Basil March recognizes in his employment contract the means to achieve self-realization by starting over in New York, free from the constraints of his Boston position. However, Howells complicates this idea that contracts provide a vehicle for self-realization by dramatizing moments in which legal discourse reveals the convergence of ethical claims and market-oriented, economic claims. For both Bartley and Basil, capitalism elides this opportunity for self-definition even as it seems to affirm it. Of all the authors considered here, Alcott and Howells then seem the most directly concerned about how to improve social conditions, and both suggest that successful legal reforms must be accompanied by economic reform as well.

James and Wharton, by contrast, seem less concerned with specific legal or economic reforms as with justice itself. In *The Portrait of a Lady,* James investigates a version of contractual justice predicated on abstraction. For Isabel Archer, like the men in

Locke's state of nature, a contract provides the opportunity to start fresh and to construct one's relationships with others from the ground up, so to speak. Each contract she enters offers the possibility for self-realization. However, the right to privacy is closely connected to her view of contract because only privacy can secure a space within which self-definition can occur. In contrast, *The Wings of the Dove* reveals that contracts are always already embedded in a complex network of social relationships that cannot be abstracted out of a particular transaction.

Like James, Wharton also raises questions about justice, and her novels suggest the danger of reducing complicated social issues to conflicting rights. Many of Wharton's novels reveal that even the ability to claim a right may not guarantee a just resolution to the dispute at hand. *The Children* provides the most compelling example of this problem and, in some ways, returns to same issues Wharton addressed at the beginning of her career in *The House of Mirth.* Both Lily Bart and Judith Wheater look to contractual obligations as a means to secure their futures, and, in Lily's case, achieve fulfillment; however, Wharton's bleak vision of social conditions and relationships suggests that no space exists for such fulfillment. Indeed, the very rigor of Wharton's vision compels her readers to consider the justice both of social conditions and of relationships with others.

Both James and Wharton push the contractual account of justice to its limits and force us to ask questions about the value of justice as an ideal. Is the "flash of de justesse" (James, *The Wings of the Dove* 397), as Merton Densher describes it, all we have left? Similarly, is Martin Boyne correct when he assumes that his negotiations with Cliffe Wheater are doomed to failure because he must use "an idiom for which the other had no equivalents"? (Wharton, *The Children* 129).

These questions highlight what might be interpreted as a methodological weakness of this project—my ambivalence about committing to a particular critical approach, such as some version of Marxism, post-Marxism, feminism, deconstruction, poststructuralism, or identity politics, and then rigorously using that approach to guide my analysis throughout the entire project. As this brief, and certainly incomplete, list of approaches to literary scholarship indicates, a multitude of theoretical approaches are available to help us read particular texts and think through the political implications of critical practice. However, this diversity is not necessarily an indication of critical dialogue. In *Between Facts and Norms,* Habermas points out that "political theory and legal theory today are disintegrating into camps that hardly have anything more to say to one another. The tension between normative approaches, which are constantly in danger of losing contact with social reality, and objectivistic approaches, which screen out all normative aspects, can be taken as a caveat against fixating on one disciplinary point of view" (6). Habermas could well have added literary theory to his list.

Though drawing on different and often contradictory critical traditions poses structural problems and risks disintegrating into incoherence, this project suggested that critical practice depends on the ability to negotiate different perspectives so as to remain open to the insights that others might offer. With John Rawls' notion of reflective equilibrium as inspiration, I attempted, then, to adopt a reflective critical stance and to create a space in which seemingly incompatible theoretical perspectives can coexist in productive tension, a give and take which I hope to explore in future work.

BIBLIOGRAPHY

BIBLIOGRAPHY

Primary Sources

Alcott, Louisa May. "The Fate of the Forrests." *Louisa May Alcott Unmasked: Collected Thrillers.* Ed. and Introd. Madeleine Stern. Boston: Northeastern UP, 1995. 144-74.

---. *The Journals of Louisa May Alcott.* Ed. Joel Myerson, Daniel Shealy, and Madeleine B. Stern. Introd. Madeleine B. Stern. Boston: Little, 1989.

---. *A Long Fatal Love Chase.* New York: Dell, 1995.

---. "M. L." *Louisa May Alcott: Race, Sex, and Slavery.* Ed. Sarah Elbert. Boston: Northeastern UP, 1997.

---. *A Modern Mephistopheles.* 1877. Introd. Jo Falcon. New York: Quality Paperback Book Club, 1995.

---. *A Modern Mephistopheles and Taming a Tartar.* Introd. Madeleine B. Stern. New York: Prager, 1987.

---. "A Pair of Eyes; or Modern Magic." *Louisa May Alcott Unmasked: Collected Thrillers.* Ed. and Introd. Madeleine Stern. Boston: Northeastern UP, 1995. 59-81.

---. *Selected Letters of Louisa May Alcott.* Ed. Joel Myerson, Daniel Shealy, and Madeleine B. Stern. Introd. Madeleine B. Stern. Boston: Little, 1987.

---. "A Whisper in the Dark." *Louisa May Alcott Unmasked: Collected Thrillers.* Ed. and Intro. Madeleine Stern. Boston: Northeastern UP, 1995. 32-58.

---. *Work: A Story of Experience.* 1873. Introd. Sarah Elbert. New York: Shocken Books, 1977.

Howells, William Dean. *Editor's Study.* Ed. James W. Simpson. Troy, NY: The Whitston Publishing Company, 1983.

---. *A Hazard of New Fortunes.* 1890. New York: Meridian, 1983.

---. *A Modern Instance. Novels: 1875-1886.* New York: Library of America, 1982. 174-588.

---. "A Non-Literary Episode." *My Literary Passions and Criticism and Fiction.* New York: Harper, 1881. 93-96.

---. "Tribulations of a Cheerful Giver." *Impressions and Experiences.* New York: Harper, 1896. 150-188.

---. *W.D. Howells: Selected Letters.* 5 vol. Ed. Robert C. Leitz III. Boston: Twayne Publishers, 1980.

James, Henry. "The Art of Fiction." *The Art of Criticism: Henry James on the Practice of Theory and the Practice of Fiction.* Ed. William Veeder and Susan M. Griffin. Chicago: U of Chicago P, 1986. 165-96.

---. *Notes of a Son and Brother.* New York: Schribner, 1914.

---. *The Portrait of a Lady.* 1881. *The Portrait of a Lady by Henry James: A Norton Critical Edition.* Ed. Robert D. Bamberg. 2nd ed. New York: Norton, 1995.

---. *The Wings of the Dove.* 1902. Introd. John Bayley. New York: Penguin Books, 1986.

Wharton, Edith. *The Children.* 1928. New York: Schribner, 1997.

---. *The House of Mirth.* 1905. *Edith Wharton: Four Novels.* New York: Library of America, 1996. 3-347.

---. *The Letters of Edith Wharton.* Ed. R. W. B. Lewis and Nancy Lewis. New York: Schribner, 1988.

---. *The Reef.* 1912. Introd. Louis Auchincloss. New York: Schribner, 1996.

---. *Summer.* 1917. Introd. Cynthia Griffin Wolff. New York: Harper & Row, 1979.

Secondary Sources

Aarsleff, Hans. "Locke's Influence." *The Cambridge Companion to Locke.* Ed. Vere Chappell. Cambridge: Cambridge UP, 1994. 252-84.

Adams, Richard. "Heir of Propriety: Inheritance, "The Impressions of a Cousin," and the Proprietary Vision of Henry James." *American Literature* 71.3 (1999): 463-91.

Altieri, Charles. "Judgment and Justice under Postmodern Conditions: or, How Lyotard Helps Us Read Rawls as a Postmodern Thinker." *Redrawing the Lines: Analytic Philosophy, Deconstruction, and Literary Theory.* Ed. Reed Way Dasenbrock. Minneapolis: U of MN P, 1989. 61-77.

Ammons, Elizabeth. *Edith Wharton's Argument with America.* Athens: U of Georgia P, 1980.

---. "Fairy-Tale Love and *The Reef.*" *American Literature* 47 (1976): 615-28.

Anesko, Michael. *'Friction with the Market': Henry James and the Profession of Authorship.* New York: Oxford UP, 1986.

---. "Recent Critical Approaches." *The Cambridge Companion to American Realism and Naturalism.* Ed. Donald Pizer. Cambridge: Cambridge UP, 1995.

Atiyah, P.S. *An Introduction to the Law of Contract.* 4th ed. Oxford: Clarendon P, 1989.

---. *Promises, Morals, and Laws.* Oxford: Clarendon P, 1981.

---. *The Rise and Fall of Freedom of Contract*. Oxford: Calrendon P, 1979.

Barron, Anne. "Lyotard and the Problem of Justice." *Judging Lyotard*. Ed. Andrew Benjamin. London: Routledge, 1992. 26-42.

Basch, Norma. *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York*. Ithaca: Cornell UP, 1982.

Bauer, Dale. *Edith Wharton's Brave New Politics*. Madison: U of WI P, 1994.

Becker, Carl. *The Declaration of Independence: A Study in the History of Political Ideas*. New York: Harcourt, 1922.

Bell, Millicent. "Isabel Archer and the Affronting of Plot." *Meaning in Henry James*. Cambridge: Harvard UP, 1991. 80-122. Rpt. in *The Portrait of a Lady: Norton Critical Edition*. Ed. Robert D. Bamberg. 2nd ed. New York: Norton, 1995. 748-83.

Bennett, George N. *The Realism of Willam Dean Howells 1889-1920*. Nashville: Vanderbuilt UP, 1973.

Bentham, Jeremy. "Anarchial Fallacies; being an examination of the Declaration of Rights issued during the French Revolution." *'Nonsense Upon Stilts': Bentham, Burke, and Marx on the Rights of Man*. Ed. and Introd. Jeremy Waldron. London: Methuen, 1987. 46-67.

---. "Article on Utilitarianism: Long Version." *The Collected Works of Jeremy Bentham: Deontology together with A Table of the Springs of Action and The Article on Utilitarianism*. Ed. Amnon Goldworth. Oxford: Clarendon P, 1983. 285-318.

---. *An Introduction to the Principles of Morals and Legislation.* Eds. J.H. Burns and H.L.A. Hart. London: Athlone P, 1970.

Binder, Guyora and Robert Weisberg. *Literary Criticisms of Law.* Princeton, NJ: Princeton UP, 2000.

Blackhall, Jean. "Charity at the Window: Narrative Technique in Edith Wharton's *Summer.*" *Edith Wharton: New Critical Essays.* Eds. Alfred Benedixen and Annette Zilversmit. New York: Garland, 1992. 115-26.

Black's Law Dictionary. 6th ed. 1990.

Boone, Joseph Allen. "Wedlock as Deadlock and Beyond: Closure and the Victorian Marriage Ideal." *Mosaic* 17 (1984): 65-81.

Booth, Wayne C. "The Ethics of Forms: Taking Flight with *The Wings of the Dove.*" *Understanding Narrative.* Ed. James Phelan and Peter J. Rabinowitz. Columbus: Ohio State UP, 1994. 99-135.

Boucher, David and Paul Kelly, ed. "The Social Contract and its Critics." *The Social Contract from Hobbes to Rawls.* London: Routledge, 1994. 1-34.

Bradbury, Nicola. "'Nothing that is not there and the nothing that is': The Celebration of Absence in *The Wings of the Dove.*" *Henry James: Fiction as History.* Ed. Ian F. A. Bell. Totowa, NJ: Barnes, 1984. 82-97.

Burton, David H. *Oliver Wendall Holmes, Jr.* Boston: Twayne, 1980.

Cady, Edwin H. *The Road to Realism: The Early Years 1837-1885 of William Dean Howells.* Syracuse: Syracuse UP, 1956.

Cardozo, Benjamin. *Law and Literature and Other Essays and Addresses.* New York: Harcourt, 1931.

Carpenter, Lynette. "'Did They Never See Anyone Angry Before?': The Sexual Politics of Self-Control in Alcott's 'A Whisper in the Dark.'" *Legacy* 3.2 (1986): 31-41.

Chapman, Mary. "The Masochistic Pleasures of the Gothic: Paternal Incest in Alcott's 'A Marble Woman.'" *American Gothic: New Interventions in a National Narrative.* Ed. Robert K. Martin and Eric Savoy. Iowa City: U of Iowa P, 1998. 183-201.

Cheny, Edna, ed. *Louisa May Alcott: Her Life, Letters, and Journals.* Boston: Little, 1901.

Chused, Richard. "Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850." *Berkeley Women's Law Journal* date 42-88.

---. "Married Women's Property Law: 1800-1850." *Georgetown Law Journal* 71 (1983): 1359-1425.

Clark, Elizabeth B. "Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America." *Law and History Review* 8.1 (1990): 25-54. Rpt. in *Gender and American Law: Women and the American Legal Order.* Ed. and Introd. Karen J. Masche. New York: Garland, 1997. 233-62.

Cope, Kevin. *John Locke Revisited.* New York: Twayne, 1999.

Crowley, John W. "The Unmastered Streak: Feminist Themes in Wharton's *Summer*." *American Literary Realism* 15.1 (1982): 86-96.

---. "The Unsmiling Aspects of Life: *A Hazard of New Fortunes.*" *Biographies of Books: The Compositional Histories of Notable American Writings*. Columbia, MO: U of MO P, 1996. 78-109.

Cutrer, Emily Fourmy. "A Pragmatic Mode of Seeing: James, Howells, and the Politics

of Vision." *American Iconology: New Approaches to Nineteenth-Century Art and Literature*. Ed. David C. Miller. New Haven: Yale UP, 1993. 259-275.

"The Declaration of Independence."

Dimock, Wai-Chee. "Debasing Exhchange: Edith Wharton's *The House of Mirth.*" *Case Studies in Contemporary Criticism: Edith Wharton's The House of Mirth.* Ed. Shari Benstock. Boston: Bedford, 1994. 375-90.

---. *Residues of Justice: Literature, Law, Philosophy*. Berkeley: U of California P, 1996.

Doyle, Christine. *Louisa May Alcott and Charlotte Bronte: Transatlantic Translations.* Knoxville, TN: U of Tennessee P, 2000.

Dunn, John. *The Political Thought of John Locke: An Historical Account of the Argument of the* Two Treatises of Government. Cambridge: Cambridge UP, 1969.

Dworkin, Ronald. *Taking Rights Seriously.* Cambridge, MA: Harvard UP, 1978.

Dworetz, Stephen M. *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution.* Durham: Duke UP, 1990.

Edel, Leon. *Henry James: A Life*. New York: Harper, 1985.

---. *Henry James: The Middle Years.* New York: Lippincott, 1953.

---. "The Myth of America in *The Portrait of a Lady*." *The Henry James Review* 7.2-3 (1986): 8-18.

Elbert, Sarah. *A Hunger for Home: Louisa May Alcott and* Little Women. Philadelphia: Temple UP, 1984.

---. ed. *Louisa May Alcott on Race, Sex, and Slavery.* Boston: Northeastern UP, 1997.

Elliott, Emory, ed. *Columbia History of the United States.* New York: Columbia UP, 1988.

Ely, Richard T. *Property and Contract in their Relations to the Distribution of Wealth.* Vol. 2. New York: Macmillian, 1914.

Erlich, Gloria. "The Sexual Education of Edith Wharton." *Literature and Psychology* 36 (1990): 26-49.

Faery, Rebecca Blevins. "Wharton's Reef: The Inscription of Female Sexuality." *Edith Wharton: New Critical Essays*. Eds. Alfred Bendixen and Annette Zilversmit. New York: Garland Publishing, 1992. 79-96.

Feldman, Stephen M. *American Legal Thought from Premodernism to Postmodernism.* Oxford: Oxford UP, 2000.

Fetterly, Judith. "Impersonating 'Little Women': The Radicalism of Alcott's *Behind a Mask.*" *Women's Studies* 10 (1984): 1-14.

---. "*Little Women*: Alcott's Civil War." *Feminist Studies* 5.2 (1979): 369-83.

Filmer, Robert. *Patriarcha.* Ed. and Introd. Peter Laslett. Oxford: Blackwell, 1949.

Flanagan, Owen. *Varieties of Moral Personality: Ethics and Psychological Realism.* Cambridge, MA: Harvard UP, 1991.

Ford, Paul Leicester. Ed. *The Writings of Thomas Jefferson.* 10 vols. New York: Putnam, 1892-99.

Foucault, Michel. *Discipline and Punish: The Birth of a Prison.* Trans. Alan Sheridan. New York: Vintage Books, 1977.

---. *The History of Sexuality: An Introduction.* Trans. Robert Hurley. New York, Vintage Books, 1990.

---. *Power/Knowledge: Selected Interviews and Other Writings 1972-77.* Ed. Colin Gordon. New York: Pantheon Books, 1980.

Freeden, Michael. *Rights*. Buckingham, UK: Open UP, 1991.

Freeman, Michael and Andrew D. E. Lewis, eds. *Law and Literature*. Oxford: Oxford UP, 1999.

Fried, Charles. *Contract as Promise: A Theory of Contractual Obligation.* Cambridge: Harvard UP, 1981.

Forbath, William E. "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age." *Wisconsin Law Review (1985): 767-817.*

Gabler-Hover, Janet. "Truth and Deception: The Basis for Judgment in *The Wings of the Dove.*" *Texas Studies in Language and Literature.* 29.2 (1987): 169-86.

Gargano, James W. "Edith Wharton's *The Reef*: The Genteel Woman's Quest for Knowledge." *Novel* 10 (1976): 40-48.

Girgus, Sam B. "The New Age of Narcissism: The Sexual Politics of Howells' *A Modern Instance*." *Mosaic* 19 (1986): 33-44.

Gilmore, Grant. *The Ages of American* Law. Columbus, OH: OH State UP, 1974.

---. *The Death of Contract*. Columbus, OH: OH State UP, 1971.

Glendon, Mary Ann. *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free P, 1991.

Gordley, James. *The Philosophical Origins of Modern Contract Doctrine*. Oxford: Claredon P, 1991.

Grafton, Kathy. "Degradation and Forbidden Love in Edith Wharton's *Summer.*" *Twentieth Century Literature.* 41.4 (1995): 350-66.

Guest, Kristen, Ed. and Introd. *Eating Their Words: Cannibalism and the Boundaries of Cultural Identity.* Albany: State U of New York, 2001.

Habegger, Alfred. "Precocious Incest: First Novels by Louisa May Alcott and Henry James." *The Massachusetts Review* 26 (1985): 233-62.

Habermas, Jurgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.* Trans. William Rehg. Cambridge, MA: MIT P, 1996.

---. *Justification and Application: Remarks on Discourse Ethics.* Trans. Ciaran P. Cronin. Cambridge, MA: MIT P, 1993.

---. "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism.*" *The Journal of Philosophy* 42.3 (1995): 109-31.

Harmon, Charles. "*A Hazard of New Fortunes* and the Reproduction of Liberalism." *Studies in American Fiction* 25.2 (1997): 183-95.

Hassner, Pierre. "Georg W. F. Hegel." Trans. Allan Bloom. *History of Political Philosophy.* Ed. Leo Strauss and Joseph Cropsey. Chicago: U of Chicago P, 1987. 732-60.

Hedges, Warren. "Howells's 'Wretched Fetishes': Character, Realism, and Other Modern Instances." *Texas Studies in Literature and Language* 38.1 (1996): 26-50.

Hegel, Georg W. F. *Phenomenology of Spirit.* Trans. A. V. Miller. Oxford: Clarendon Press, 1977.

---. *Philosophy of Right.* 1841. Trans. T. M. Knox. Oxford: Clarendon Press, 1942.

Hillman, Robert A. *The Richness of Contract Law.* Dordrecht: Kluwer, 1997.

Hobbes, Thomas. *Leviathan.* 1651. Ed. and Introd. J.C.A. Gaskin. Oxford: Oxford

UP, 1996.

Hoff, Joan. *Law, Gender, and Injustice: A Legal History of U. S. Women.* New York: New York UP, 1991.

Hohfield, Wesley Newcomb. "Fundamental Legal Conceptions." *Yale Law Journal* 23 (1913): 16-59.

Holmes, Oliver Wendell, Jr. *The Common Law.* Boston: Little, Brown and Company, 1881.

---. "Natural Law." *Collected Legal Papers.* NY: Harcourt, 1920. 310-16.

---. "The Path of the Law." *Collected Legal Papers.* NY: Harcourt, 1920. 167-202.

Horwitz, Morton J. "The Historical Foundations of Modern Contract Law." *Harvard Law Review* 87 (1974): 917-56. Rpt. in *Essays in Nineteenth-Century American Legal History.* Ed. Wythe Holt. Westport, CT: Greenwood P, 1976. 204-43.

---. "The Emergence of an Instrumental Conception of American Law." *Perspectives in American History* 5 (1971): 287-326. Rpt. in *Essays in Nineteenth-Century American Legal History.* Ed. Wythe Holt. Westport, CT: Greenwood P, 1976. 104-43.

---.*The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy.* New York: Oxford UP, 1992.

Hoy, David Couzens and Thomas McCarthy. *Critical Theory.* Cambridge, MA: Blackwell, 1994.

Hume, David. "Of the Original Contract." 1748. *Social Contract: Essays by Locke, Hume, and Rousseau.* Introd. Sir Ernest Barker. London: Oxford UP, 1947. 147-66.

Inness, Sherrie A. "Nature, Culture, and Sexual Economics in Edith Wharton's *The Reef*." *American Literary Realism* 26 (1993): 76-90.

Jones, Peter. *Rights*. London: Macmillian, 1994.

Kain, Phillip J. *Marx and Ethics*. Oxford: Claredon P, 1988.

Kant, Immanuel. "The Metaphysics of Morals." *Kant: Political Writings*. Ed. Hans Reiss. Cambridge: Cambridge UP, 1991. 131-75.

---. "On the Common Saying: 'This May be True in Theory, but It Does Not Apply in Practice." *Kant: Political Writings*. Ed. Hans Reiss. Cambridge: Cambridge UP, 1991. 61-92.

Kaplan, Amy. *The Social Construction of American Realism*. Chicago: U of Chicago P, 1988.

King, Kristin. "Ethereal Milly Theale in *The Wings of the Dove*: The Transparent Heart of James' Opaque Style." *Henry James Review* 21.1 (2000): 1-13.

Kent, James. *Commentaries on American Law*. Vol. 2 12th ed. Ed. Oliver Wendell Holmes, Jr. Boston: Little, 1873.

Keyser, Elizabeth Lennox. "'The Ways in Which the Heart Speaks': Letters in *The Reef*." *Studies in American Fiction* 19 (1991): 95-106.

---. *Whispers in the Dark: The Fiction of Louisa May Alcott*. Knoxville, TN: U of Tennessee P, 1995.

Kohan, Kevin. "Victims of Metaphor in *The Wings of the Dove*." *The Henry James Review*. 20.2. (1999): 135-54.

Larson, Doran. "Milly's Bargain: The Homosocial Economy in *The Wings of the Dove*." *Arizona Quarterly* 51.1 (1995): 81-110.

Lessnoff, Michael. *Social Contract.* London: Macmillian, 1986.

Lewis, R. W. B. *Edith Wharton: A Biography.* New York: Harper & Row, 1975.

Lindley, Lester G. *Contract, Economic Change, and the Search for Order in Industrializing America.* New York: Garland Publishers, 1993.

Lindley, Richard. *Autonomy.* London: MacMillian, 1986.

Locke, John. *The Second Treatise of Government.* 1690. *Political Writings of John Locke.* Ed. and Introd. David Wotton. New York: Penguin, 1993. 261-387.

Lutz, Donald S. *The Origins of American Constitutionalism.* Baton Rouge: Louisiana State UP, 1988.

Lyotard, Jean-Francois. *The Differend: Phrases in Dispute.* Trans. Georges Van Den Abbeele. Minneapolis: U of Minnesota P, 1988.

---. *The Postmodern Condition: A Report on Knowledge.* Trans. Geoff Bennington and Brian Massumi. Minneapolis: U of Minnesota P, 1984.

MacComb, Deborah. "Divorce of a Nation; or, Can Isabel Archer Resist History?" *The Henry James Review* 17 (1996): 129-48.

MacDonald, Ruth K. *Louisa May Alcott.* Boston: Twayne, 1983.

MacNaughton, William R. "Edith Wharton's 'Bad Heroine': Sophy Viner in *The Reef.*" *Studies in the Novel* 25 (1993): 213-25.

MacNeil, Ian. *The New Social Contract.* New Haven: Yale UP, 1980.

MacPherson, C. B. *The Political Theory of Possessive Individualism: Hobbes to Locke.* Oxford: Claredon P, 1962.

Marsella, Joy A. *The Promise of Destiny: Children and Women in the Short Stories of Louisa May Alcott.* Westport, CT: Greenwood P, 1983.

Martin, Rex. *Rawls and Rights*. Lawrence, KA: UP of KA, 1985.

Marx, Karl. "On the Jewish Question." *Karl Marx: Selected Writings*. Ed. David McLellan. Oxford: Oxford UP, 1977. 39-62.

McMaster, Juliet. "The Portrait of Isabel Archer." *American Literature* 45.1 (1973): 50-66.

McGowan, Miranda Oshige. "Property's Portrait of a Lady." *Minnesota Law Review* 85 (2001): 1037-1118.

McLellan, David. *Karl Marx*. New York: Penguin P, 1975.

McMurray, William. *The Literary Realism of William Dean Howells*. Carbondale, IL: Southern IL UP, 1967.

Meigs, Cornelia. *Invincible Louisa: The Story of the Author of* Little Women. Boston: Little, 1933.

Michaels, Walter Benn. *The Gold Standard and the Logic of Naturalism*. Berkley: U of CA P, 1987.

Mill, John Stuart. *On Liberty and Other Writings*. Ed. Stefan Collini. Cambridge, UK: Cambridge UP, 1989.

---. *Principles of Political Economy with Some of their Applications to Social Philosophy*. Ed. and Introd. Sir W. J. Ashley. London: Longmans, Green, and Company, 1909.

Mitchell, Lee Clark. "Beyond the Frame of *The Portrait of a Lady*." *Raritan* 17.3 (1998): 90-109.

---. "Sustaining Duplicities of *The Wings of the Dove*." *Texas Studies in Language and Literature* 29.2 (1987): 187-214.

Moddelmog, William E. "Discovering Personality: Privacy and Subjectivity *in The House of Mirth*." *American Literature* 70 (1998): 337-63.

Morison, John and Christine Bell, eds. *Tall Stories? Reading Law and Literature*. Brookfield, VT: Dartmouth Publishing Company, 1996.

Myerson, Joel, Daniel Shealy, and Madeleine B. Stern. *The Journals of Louisa May Alcott.* Intro. Madeleine B. Stern. Boston: Little, 1989.

Nelson, William E. "The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America." *Harvard Law Review* 87 (1974): 513-66. Rpt. in *Essays in Nineteenth-Century American Legal History*. Ed. Wythe Holt. Westport, CT: Greenwood P, 1976. 145-99.

Niemtzow, Annette. "Marriage and the New Woman in *The Portrait of a Lady.*" *American Literature* 47.3 (1975): 377-95.

Nietzsche, Friedrich. *Basic Writings of Nietzsche.* Trans. and Ed. Walter Kaufman. New York: Modern Library, 2000.

Novick, Sheldon M. *Henry James: The Young Master.* New York: Random House, 1996.

Nozick, Robert. *Anarchy, State, Utopia.* New York: Basic Books, 1974.

Nussbaum, Martha C. *Poetic Justice: The Literary Imagination and Public Life.* Boston: Beacon, 1995.

Oldfield, Adrian. *Citizenship and Community: Civic Republicanism and the Modern World.* London: Routledge, 1990.

Pateman, Carol. *The Sexual Contract*. Cambridge: Polity, 1988.

Papke, Mary. *Verging on the Abyss: The Social Fiction of Kate Chopin and Edith Wharton.* Westport, CT: Greenwood, 1990.

Parkes, Adam. "A Sense of Justice: Whistler, Ruskin, James, Impressionism." *Victorian Studies* 42.4 (1999/2000): 593-629.

Parrish, Timothy L. "Haymarket and *Hazard*: The Lonely Politics of William Dean Howells." *The Journal of American Culture* 17.4 (1994): 23-32.

---. "Howells Untethered: The Dean and 'Diversity.'" *Studies in American Fiction* 23.1 (1995): 101-17.

Parsons, Theophilus. *The Law of Contracts.* 2 vols. Boston: Little, 1957.

Perry, Ralph. *Puritanism and Democracy.* New York: Vanguard, 1944.

Peyser, Thomas Galt. "Those Other Selves: Consciousness in the 1890 Publications of Howells and the James Brothers." *American Literary Realism* 25.1 (1992): 20-37.

Pick, Anat. "Miracles of Arrangement: Structures of Multiplicity and the Birth of Justice in Henry James's *The Golden Bowl.*" *The Henry James Review* 21.2 (2000): 115-32.

Posner, Richard A. *Law and Literature: A Misunderstood Relation.* Cambridge: Harvard UP, 1988.

Pratt, Walter F. Jr., "American Contract Law at the Turn of the Century." *South Carolina Law Review* 39 (1988): 415-64.

Pusey, Michael. *Jurgen Habermas.* London: Tavistock, 1987.

Rabkin, Peggy A. *Fathers to Daughters: The Legal Foundation of Female Emancipation.* Westport, CT: Greenwood, 1980.

Rawls, John. "The Basic Liberties and Their Priority." *Tanner Lectures on Human*

Values. Ed. Sterling M. McFurrin. Vol. 3. Salt Lake City, UT: U of Utah P, 1982.

---. *Justice as Fairness: A Restatement.* Ed. Erin Kelly. Cambridge, MA: Harvard UP, 2001.

---. *Political Liberalism.* New York: Columbia UP, 1996.

---. *A Theory of Justice.* Rev. ed. Cambridge, MA: Harvard UP, 1999.

Reiss, Hans. Introduction. and Ed. *Kant: Political Writings.* Cambridge: Cambridge UP, 1991. 1-40.

Reiman, Jeffery. "Moral Philosophy: The Critique of Capitalism and the Problem of Ideology." *The Cambridge Companion to Marx.* Ed. Terrell Carver. Cambridge: Cambridge UP, 1991. 143-67.

Restatement (Second) of Contracts.

Reynolds, David S. *Beneath the American Renaissance: The Subversive Imagination in the Age of Emerson and Melville.* New York: Knopf, 1988.

Rigsby, Mary. "'So Like Women!': Louisa May Alcott's *Work* and the Ideology of Relations." *Redefining the Political Novel: American Women Writers, 1797-1901.* Ed. Sharon M. Harris. Knoxville, TN: U of Tennessee P, 1995. 109-27.

Rockwood, Bruce L., ed. *Law and Literature Perspectives.* New York: Peter Lang, 1996.

Rodenbeck, John. "The Bolted Door in James's *The Portrait of a Lady.*" *Modern Fiction Studies* 10 (1964): 330-40.

Rosenfield, Michel. "The Relationship Between Classical Contract Law and Social Contract Theory." *Iowa Law Review* 70 (1985): 769-900.

Rousseau, Jean-Jacques. *The Social Contract and Discourses*. Trans. G.D.H Cole. London: Orion, 1993.

Rubin, Gayle. "The Traffic in Women: Notes on the 'Political Economy' of Sex." *Toward an Anthropology of Women*. Ed. Rayna R. Reiter. New York: Monthly Review, 1975. 157-210.

Salmon, Marylynn. *Women and the Law of Property in Early America.* Chapel Hill: U of North Carolina P, 1986.

Sandel, Michael J. *Liberalism and the Limits of Justice.* Cambridge, UK: Cambridge UP, 1982.

Sangari, Kumkum. "*The Wings of the Dove:* 'Not Knowing But Only Guessing.'" *Henry James Review.* 13.3 (1992): 292-305.

Sanderson, Rena. "*A Modern Mephistopheles*: Louisa May Alcott's Exorcism of Patriarchy." *ATQ* 5 (1991): 41-55.

Schneewind, J. B. *The Invention of Autonomy: A History of Modern Moral Philosophy.* Cambridge, UK: Cambridge UP, 1998.

Sensibar, Judith L. "Edith Wharton Reads the Bachelor Type: Her Critique of Modernism's Representative Man." *American Literature.* 60.4 (1988): 575-90.

Shammas, Carole, Marylynn Salmon, and Michel Dahlin. *Inheritance in America from Colonial Times to the Present.* New Brunswick, NJ: Rutgers UP, 1987.

Shanley, Mary Lydon. "Marriage Contract and Social Contract in Seventeenth-Century English Political Thought." *The Family in Political Thought*. Ed. Jean Bethke Elshtain. Amherst: U of Massachusetts P, 1982. 80-95.

Showalter, Elaine, ed. *Alternative Alcott.* New Brunswick, NJ: Rutgers UP, 1988.

Simons, Jon. *Foucault and the Political.* London: Routledge, 1995.

Singer, Joseph William. "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfield." *Wisconsin Law Review* (1983): 975-1059.

Skillern, Rhonda. "Becoming a 'Good Girl': Law, Language, and Ritual in Edith Wharton's *Summer. The Cambridge Companion to Edith Wharton.* Ed. Millicent Bell. New York: Cambridge UP, 1995. 117-36.

Smith, John William and Vincent T. Thompson. *The Law of Contracts*. Philadelphia: T. and J.W. Johnson, 1878.

Stanley, Amy Dru. "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation." *Journal of American History* 75 (1988): 471-500. Rpt. in *Gender and American Law: Women and the American Legal Order.* Ed. and Introd. Karen J. Masche. New York: Garland, 1997. 149-78.

Stern, Madeleine. Ed. *Critical Essays on Louisa May Alcott.* Boston: Hall, 1984.

---. *Louisa May Alcott: A Biography.* Boston: Northeastern UP, 1999.

---. *Louisa May Alcott: From Blood & Thunder to Hearth and Home.* Boston: Northeastern UP, 1998.

Stone, Lawrence. *The Family, Sex, and Marriage in England 1500-1800.* New York: Harper, 1977.

Strickland, Charles. *Victorian Domesticity: Families in the Life and Art of Louisa May Alcott*. N.p.: U of Alabama P, 1985.

Stueurman, Emilia. "Habermas vs. Lyotard: Modernity vs. Postmodernity." *Judging Lyotard.* Ed. Andrew Benjamin. London: Routledge, 1992. 99-118.

Sunstein, Cass R. *Legal Reasoning and Political Conflict.* New York: Oxford UP,

1996.

Teahan, Sheila. "The Abyss of Language in *The Wings of the Dove.*" *The Henry James Review.* 14.2 (1993): 204-14.

Thomas, Brooks. *American Literary Realism and the Failed Promise of Contract.* Berkeley: U of California P, 1997.

Torsney, Cheryl B. "The Political Context of *The Portrait of a Lady.*" *The Henry James Review* 7.2-3 (1986): 86-104.

Trachtenberg, Alan. *The Incorporation of America: Culture and Society in the Gilded Age.* New York: Hill, 1982.

Tucker, Irene. *A Probable State: The Novel, The Contract, and The Jews.* Chicago: U of Chicago P, 2000.

---. "What Maisie Promised: Realism, Liberalism and the Ends of Contract." *The Yale Journal of Criticism* 11.2 (1998): 335-64.

Tuttleton, James W. "Mocking Fate: Romantic Idealism in Edith Wharton's *The Reef.*" *Studies in the Novel* 19 (1987): 459- 74.

Tyler, Ransom H. *Commentaries on the Law of Infancy and Coverture.* Albany: Gould, 1868.

Uba, George R. "Status and Contract: The Divorce Dispute of the Eighties and Howells' *A Modern Instance.*" *Colby Library Quarterly* 19.2 (1983): 78-89.

Vanderbilt, Kermit. *The Achievement of William Dean Howells: A Reinterpretation.* Princeton, NJ: Princeton UP, 1968.

Veeder, William. "The Portrait of Lack." *New Essays on Portrait of a Lady.* Ed. Joel Porte. Cambridge: Harvard UP, 1990. 95-121. Rpt. in *The Portrait of a Lady:*

Norton Critical Edition. Ed. Robert D. Bamberg. 2nd ed. New York: Norton, 1995. 729-47.

Wallace, James D. "Where the Absent Father Went: Alcott's *Work.*" *Refiguring the Father: New Feminist Readings of Patriarchy*. Eds. Patricia Yeager and Beth Kowalski Wallace. Carbondale, IL: Southern IL UP, 1989. 259-74.

Warren, Samuel D. and Louis D. Brandeis. "The Right to Privacy." *Harvard Law Review*. 6.5 (1890): 193-220.

Weisburg, Richard H. *Poethics, and Other Strategies of Law and Literature*. New York: Columbia UP, 1992.

Williams, Howard. "Kant on the Social Contract." *The Social Contract From Hobbes to Rawls.* Ed. David Boucher and Paul Kelly. London: Routledge, 1994. 132-46.

Wolff, Cynthia Griffin. *A Feast of Words: The Triumph of Edith Wharton*. NY: Oxford, 1977.

Wortman, Marlene Stein, ed. *Women in American Law: From Colonial Times to the New Deal.* Vol. 1. New York: Holmes, 1984.

Wright, Ellen F. "Given Bartley, Given Marcia: A Reconsideration of Howells' *A Modern Instance*." *Texas Studies in Language and Literature* 23.2 (1981): 214-31.

VITA

Alicia Mischa Renfroe was born on April 22, 1969, in Middlesboro, Kentucky, to Ronald and Helen Renfroe. She grew up in Speedwell, Tennessee, and attended Powell Valley High School, graduating Valedictorian in 1987. In September, 1987, she entered the University of Tennessee in Knoxville, Tennessee, and in May 1991, she received a Bachelor of Arts in Honors English and Political Science, with High Honors. She entered the University of Florida College of Law in January, 1992, and in December, 1994, she received a Juris Doctorate and was admitted to the Florida Bar Association in May 1995. In August, 1995, she entered the Master of Arts program in English at the University of Tennessee, and in May, 1997, she received a Master of Arts in English with an emphasis in Creative Writing. In August, 1997, she began work on a Doctor of Philosophy degree in English at the University of Tennessee. During her five years in the doctoral program, she taught freshman composition courses, tutored students in the University of Tennessee Writing Center, and served as an Editorial Assistant for Allen Dunn at *Soundings: An Interdisciplinary Journal*. She received the Chancellor's Fellowship for Outstanding First-Year Graduate Student, the Norman J. Sanders Dissertation Fellowship, the University of Tennessee Arthur Yates Fellowship, the Thomas Wheeler Traveling Fellowship, and the University of Tennessee Provost's Award for Professional Promise. She will be awarded the doctoral degree in December, 2002. In August, 2002, she will begin a one-year appointment as Lecturer in the University of Tennessee Department of English.